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In the Supreme Court of the United States

OCTOBER TERM, 1933

NO. 555

MONAMOTOR OIL COMPANY
Appellant,

vs.

RAY E. JOHNSON, Treasurer of the State of Iowa, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

NATURE OF THE ACTION

This is an action in equity brought by Appellant to restrain the executive officers of the State of Iowa from taking any action to enforce the motor vehicle fuel tax laws of the State of Iowa at a time when the only action being pursued by the officers, or contemplated by them, was the prosecution of a suit at law previously commenced in the state Court for a money judgment against Appellant for motor vehicle fuel license fees alleged to be due the State of Iowa.

STATEMENT OF THE CASE

The statement of the case made by the trial Court is so clear and comprehensive that we are tempted to adopt its statement as found in the opinion commencing on page 79 of the transcript as the statement of the case. However, some useful purpose may be served by setting out briefly here the situation out of which the case arose, and the primary questions before the Court for determination.

The motor vehicle fuel tax law of the State of Iowa as it existed at the time this case arose is contained in Chapter 251-A1 of the Code of 1931, said chapter being set out in full in the appendix to this Brief and Argument. That Chapter imposes a license fee of two cents per gallon. Subsequent to its original enactment another act was passed levying an additional one cent per gallon on motor vehicle fuel. At the time this case arose the provisions of that act appeared in the Code of 1931 as Section 4755-b38, and in view of its brevity it is set out herein in full as follows:

> "4755-b38. Motor vehicle fuel—additional tax. There is hereby levied on all motor vehicle fuel imported and used within this state a license fee of one cent per gallon, which shall be in addition to the license fee levied by Chapter 251-A1. All of the provisions and conditions of said Chapter 251-A1 relating to the levy, collection or payment of the license fee on motor vehicle fuel shall apply with equal force to the license fee levied herein. Out of the proceeds of said additional license fee the state highway commission shall, each year, set aside a sufficient amount to pay the portion of the bridge, culvert, and right of way refund becoming due and payable on January first of the succeeding year. The remainder of the proceeds of said additional license fee shall be credited to the primary road fund."

The Mona Motor Oil Company at the time this action arose and for several years prior thereto was an Arizona corporation engaged in the oil distributing business in the State of Iowa and surrounding states wtih its principal place of business at Council Bluffs, Iowa, and it maintained in Iowa some fifty-nine service stations at which motor vehicle fuel was sold at retail, owning thirty of the stations and leasing twenty-nine others. It also maintained at Council Bluffs, Iowa, a bulk plant into which motor vehicle fuel was dumped from tank cars in which it was brought into the state and from this bulk and storage plant the fuel was withdrawn for sale locally in Iowa and to some extent also for sale in Nebraska and surrounding states.

The boundary line between the State of Iowa and Nebraska is the Missouri River, Council Bluffs being on the Iowa side of the River and Omaha, Nebraska on the Nebraska side of the River. Some years ago the Missouri River changed its course at about that point leaving a strip of Iowa territory on the west side or Nebraska side of the Missouri River. This strip of territory is known as Carter Lake, Iowa, and it belongs to Iowa although on the Nebraska side of the river and separated from the remaining portion of the State of Iowa by the Missouri River. On this strip of land the Mona Motor Oil Company maintained a refinery for a time at which crude oil coming from the oil fields of Oklahoma and Kansas were refined, and there was maintained at Carter Lake a bulk plant which is known in this record as Omaha Bulk where refined motor vehicle fuel was stored until sold.

No motor vehicle fuel is produced in Iowa and none was ever refined in Iowa except such as was refined, during a lim-

ited period, at Carter Lake, Iowa, by the Mona Motor Oil Company. The trial Court found the facts on that proposition as follows:

> "No gasoline has ever been produced or refined in Iowa, except that refined by the Mona Motor Oil Company at Carter Lake, Iowa, prior to April 1, 1932." Tr. p. 87.

At the time the Mona Motor Oil Company began to do business in Iowa about the year 1927, it took out a license as an Iowa distributor for which no fee is charged and from that time made its reports monthly as required by the Iowa statutes and paid to the State of Iowa the license fees shown by these reports to be due until early in the year 1932 when the situation developed which resulted in this litigation.

The Mona Motor Oil Company had requested of the Treasurer of the State of Iowa, who is the officer charged with the collection of the motor vehicle fuel license fees, that the bulk plant at Carter Lake be treated as outside the State of Iowa and that movements of motor vehicle fuel from Carter Lake to Council Bluffs, Iowa, be reported as imported gasoline or motor vehicle fuel. In the opinion of the trial Court this fact is stated and found as follows:

> "At one time the oil company requested the treasurer of state to treat gasoline imported to Carter Lake as being in Nebraska and called it the Omaha bulk station. They were granted this permission and subsequent reports were made on that basis. (fol. 88)." Tr. p. 85.

Such products, in fact, did move through the State of Nebraska in order to cross the Missouri River at Omaha and enter the State of Iowa for purposes of consumption and the Mona

Motor Oil Company had reported movements of that character and reported receipts from Carter Lake at Council Bluffs as imported gasoline or motor vehicle fuel.

About the month of April, 1932, it was discovered by officers of the State of Iowa that tank cars billed as lubricating oil were being unloaded at the bulk plant at Council Bluffs as gasoline and the officers of the State of Iowa immediately instituted an investigation which disclosed that some forty carloads of gasoline had thus been shipped from Carter Lake through Nebraska territory and across the Missouri River and unloaded in the bulk plant at Council Bluffs, without any report thereof being made to the Treasurer of the State of Iowa. Criminal proceedings were instituted against the officers of the company and the corporation and indictments returned, and about the same time an audit was made of the books of the company which disclosed that these forty cars had been shipped as lubricating oil although they were, in fact, gasoline and that the records of the Mona Motor Oil Company had been changed by erasing a part of the word "gasoline" and writing in the word "oil" so as to make the record read "gas oil," and the audit disclosed that the tax on these forty cars was some $27,000.00. The criminal cases were all disposed of by accepting pleas of guilty from the officers in some of the cases and dismissing others, and the indictments against the corporation were dismissed and all these criminal cases were disposed of before the case at bar was instituted.

After the criminal cases were disposed of, the State brought an action at law in the state Court at Council Bluffs asking a money judgment against the Mona Motor Oil Com-

pany for the tax on these forty cars of gasoline. This suit was aided by an attachment against the real estate of the Mona Motor Oil Company, the attachment lien being perfected by the entry by the Sheriff of a notation in the lien index kept in the office of the Clerk of the District Court of the County. The Sheriff's return on the writ of attachment appears on the writ of attachment commencing on page 215. There was no seizure of any of the property of the Mona Motor Oil Company, no attempt to take possession of it nor to interfere in any way with the right of the Mona Motor Oil Company to use and control all of its property except that it could not have sold the real estate free of the attachment lien.

After this suit had been started in the state Court the Mona Motor Oil Company brought this action in equity in the United States District Court for the Southern District of Iowa, praying for an injunction against the executive officers of the state restraining them from taking any action to enforce the motor vehicle fuel tax laws of the state. Thereafter, they appeared in the case previously commenced in the state Court and filed a petition for the removal of that case to the United States District Court. After the case was docketed in the United States District Court a motion to remand the same to the state Court was filed by the plaintiffs on the ground that the action was between the State of Iowa and the Mona Motor Oil Company and there was no such diversity of citizenship as would authorize the removal. This motion was sustained and the case remanded to the state Court. No further proceedings were had in the state Court in view of the pendency of this action.

The constitutionality of the motor vehicle fuel tax laws

of the State of Iowa were assailed by Appellant on a number of grounds. Some of these grounds had to do with the alleged failure of the act to comply with some of the provisions of the State Constitution of the State of Iowa but since these grounds of attack have been abandoned by Appellant in the brief filed in this case, no reference need be made to them.

While the allegations of the petition with reference to the violations of the Constitution of the United States, both in the provisions of the law under which the tax is levied and the manner in which it is administered by the officers of the State of Iowa, are numerous, these claims can be grouped generally into three classes as follows:

First, that the motor vehicle fuel tax laws of the State of Iowa by their provisions and the manner in which they are administered creates a burden upon interstate commerce.

Second, that the collection of the tax from the distributor when the levy is made against the user amounts to a taking of property without due process of law.

Third, that permitting the users of motor vehicle fuel for purposes other than the operation of motor vehicles upon the public highways to obtain a refund and the turning over to them of taxes collected from the distributor is a taking of property for other than a public purpose and in violation of both the State Constitution and the Constitution of the United States.

The defendants (Appellees) below filed a somewhat

voluminous answer in which these charges were denied and in which it was alleged that if there was discrimination it was in complainant's favor and it could not be heard to raise the question, and further that the complainant had collected from the users the amount of this tax by virtue of the provisions of the motor vehicle fuel tax laws of the State of Iowa and it could not now claim as an excuse for retaining the money that those laws were unconstitutional and void, and further that Appellant was estopped because it had regularly paid the tax for a number of years without protest or challenge during which the state or its subdiyisions had incurred indebtedness of some $100,000,000 with complainants knowledge and in reliance on the revenues produced by the act.

The Court, in deciding the case, filed an exhaustive opinion with findings of fact and conclusions of law which is set out on pages 79 to 132 of the transcript in this case to which reference is made for a more complete and succinct statement of the case.

In view of the fact that it will be necessary to refer to these statutes in detail in the argument with reference to various propositions urged by Appellant, only a general statement of their nature and method of operation will be attempted here.

Chapter 251-A1 of the Code imposes the tax in Section 5093-a1 thereof in the following language:

> "A license fee of two cents per gallon, or fraction of a gallon is hereby imposed on all motor vehicle fuel used or otherwise disposed of in this state for any purpose what-

soever. Any person using motor vehicle fuel within the state shall be liable for the fee herein provided for unless the same shall have been previously paid."

Section 4755-b38 imposes an additional one cent tax and provides:

"All of the provisions and conditions of said Chapter 251-A1 relating to the levy, collection or payment of the license fee on motor vehicle fuel shall apply with equal force to the license fee levied herein."

The Supreme Court of the State of Iowa has held what is obvious from a reading of this section that its effect was to increase by one cent the motor vehicle fuel license fee imposed by Chapter 251-A1. See

State vs. Northern Oil Company, 209 Iowa, 980.

Section 5093-a2 of Chapter 251-A1 defines a distributor as follows:

"The term 'distributor' as used in this chapter shall mean any person who brings into the state or who produces, refines, manufactures or compounds within the state any motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state."

The chapter also contains a provision that the term "person" shall include individual, partnership, corporation and association.

The Chapter further provides that a distributor, as above

defined, shall make a report on the twentieth of each calendar month to the Treasurer of State on forms prescribed by the treasurer, which report shall show in the language of the chapter,

> "The total number of gallons of motor vehicle fuel and/or of any substance or material imported into the state for the purpose of manufacturing, mixing, blending or compounding motor vehicle fuels as defined in this chapter, imported by him during the preceding calendar month, the date of receipt, unloading point, tank car identification and invoiced gallonage of each and every tank car or other receptacle in which motor vehicle fuel is imported into the State of Iowa. If no importations are made during the preceding calendar month a report shall be made to that effect on forms prescribed herein and in the same manner. At the same time he shall remit to the treasurer the amount of license fee for such preceding month; provided, however, that in computing said amount a deduction of three per cent of the invoiced gallonage imported may be made for evaporation and loss."

Said Chapter further provides in Section 5093-a3 that sellers of motor vehicle fuel shall keep posted at their place of business a placard advising the public that the state license fee is included in the purchase price of all motor vehicle fuels, the language of said section being as follows:

> "Any person who sells or offers for sale at retail motor vehicle fuel in this state, shall keep posted in a conspicuous place most accessible to the public at his place of business a placard showing the total sale price per gallon including license fee on all grades of motor vehicle fuel sold, said placard to have printed thereon the words 'state license fee included'."

In connection with these provisions it should be borne in

mind what was stipulated in this record to be a fact, viz: that all the motor vehicle fuel used in the State of Iowa must come into the state from some other state in some form because there is no petroleum of any kind produced within the state.

The Chapter further provides in Section 5093-a8 thereof that if any person buy or use motor vehicle fuel for any purpose other than

> "propelling motor vehicles operated in whole or in part upon the public highways of the state or upon the streets of any city or town in the state shall be reimbursed and repaid to the extent of such license fee paid by him."

This section further provides for the filing of the claim for refund and provides that it must have attached thereto the original invoices showing the purchase of the motor vehicle fuel.

It will be observed that the tax is levied by the provisions of Section 5093-a1 against the user. And that by the provisions of Section 5093-a5, distributors, who are the persons first receiving the motor vehicle fuel in the State of Iowa, are required, as an administrative feature, to pay the tax on the motor vehicle fuel used or sold for use by them in the State of Iowa. And they in turn are required to pass on the tax to the consumer or user because by the provisions of Section 5093-a3, they and every dealer selling motor vehicle fuel at retail must advise the purchaser that the price he is paying includes the license fee.

The Court below in its opinion outlined the act as follows:

"Upon consideration of the entire act, the intention of the legislature is readily apparent; first, a levy is made upon all motor vehicle fuel used or consumed in the state; second, the person or persons using the fuel within the state are made liable for the payment of the fees; third, a refund is granted to users of such motor vehicle fuel other than users on the public highways; and, fourth, the distributor, for the privilege of selling and dispensing of gasoline within the state of Iowa, is to be a toll collector and administer the collection of the tax, making his reports as required by Section 5093-a5, and in either paying or advancing the tax on the 20th day of the month following that on which the gasoline was imported and unloaded by him."

In the administration of this chapter, the provisions of the law as above outlined and interpreted, have been strictly adhered to by the administrative officers of the State of Iowa. And the procedure followed is that which is clearly contemplated by the statutes.

On the twentieth of each month each distributor files a report in which he lists all motor vehicle fuel received by him during the preceding calendar month. That is to say, that on the twentieth of March, for instance, he would report all the fuel received during the month of February showing the date of unloading from tank car, or other receptacle in which it was received, so that the State of Iowa does not require even a report of motor vehicle fuel received from outside the state for a period of at least twenty days after the fuel is unloaded, and in this report a deduction is made of the motor vehicle fuel sold for use outside the State of Iowa leaving a balance on which the tax is computed. In each case the distributor makes his own report, computes the tax himself and remits to the treasurer the license fees shown by said report.

One of the blank forms furnished to distributors is set out as exhibit 3 on page 291 of the Transcript. It does not contain a space for deducting any balance of motor vehicle fuel on hand at the end of the month. And the evidence disclosed that all distributors paid without making or requesting any such deduction. This practice was encouraged by the officers of the state, and is the practice contemplated by the statute. The distributor may, as suggested by the trial Court, be required to advance these fees on any balance of motor vehicle fuel remaining unsold in return for the privilege of engaging in business as a distributor. Whether there would be a balance would, of course, depend upon the rapidity of the turn over. But since the payment is not required to be made until the 20th of the month following the month of receipt, such balance would be in any event trivial and inconsequential.

Complainant (Appellant herein) attempted to make the point that there was some invasion of its rights requiring it to pay the tax on motor vehicle fuel which had not yet been sold or disposed of or, in other words, on motor vehicle fuel which it had on hand at the end of the month. It is obvious, of course, that the result in the long run would be the same whether the method of reporting which was adopted was used or whether an inventory was taken at the end of each month. The fact seems to be that no distributor ever requested the privilege of deducting the amount on hand at the end of the month and the complainant in this case never requested any such privilege, and it is obvious that a great inconvenience would result to it if it were required to report in that manner because it would involve taking an inventory, not only at the bulk plant at Council Bluffs, but at each of the fifty-nine filling stations operated by complainant. And it is suggested

further that it is within the power of the State to prescribe the conditions under which distributors of motor vehicle fuel within the State shall be permitted to engage in that occupation.

Other features of the case will be discussed in more detail in connection with specific complaints made against the statutes.

SUMMARY OF ARGUMENT

I.

THE FINDINGS OF FACT BY THE TRIAL COURT ARE BINDING ON APPEAL WHERE THERE IS ANY EVIDENCE TO SUSTAIN THEM.

The general presumption, on appeal, is in favor of the findings of fact made by the lower court.

4 C. J., 774.
Manhattan L. Ins. Co. vs. Wright, 126 Fed. 82.

See also

Parkinson vs. Thompson, 164 Ind. 609, 73 N. E. 109, 3 Ann. Cas. 677.
Chase vs. Hinkley, 126 Wis. 75, 105 N. W., 230, 110 A. S. R. 896, 5 Ann. Cas. 328, 2 L. R. A. (N. S.) 738.

II.

THE PRESUMPTION IS ALWAYS IN FAVOR OF THE CONSTITUTIONALITY OF LEGISLATIVE ENACTMENTS AND SUCH ENACTMENTS WILL NOT BE DECLARED UNCONSTITUTIONAL UNLESS SUCH UNCONSTITUTIONALITY CLEARLY APPEARS.

It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the Court should adopt the construction which would uphold it.

6 R. C. L. Section 77.
Presser vs. State of Illinois, 116 U. S. 252.
Knights Templars' & Masons' Life Indemnity Co. vs. Jarman, 187 U. S. 197.
Harriman vs. Interstate Commerce Commission, 211 U. S. 407.
United States vs. Delaware & H. Co., 213 U. S., 366.

III.

THIS ACTION BY COMPLAINANT (Appellant) IN EQUITY FOR INJUNCTIVE RELIEF ONLY IS NOT MAINTAINABLE FOR THE FOLLOWING REASONS:

a. The Complainant has an adequate remedy at law because there is nothing involved except the question as to the amount of motor vehicle fuel license fees, if any, owing by

complainant to the State of Iowa and under such circumstances equity will not take jurisdiction, and no irreparable injury appears.

Authorities:

21 C. J., pages 35, 41 and 38;
28 U. S. C. A., Sec. 384 (Judicial Code, Sec. 267).
Boise Artesian Hot & Cold Water Co. vs. Boise City, 213 U. S. 276.
U. S. vs. Bitteroot Dev. Co., 200 U. S. 451.
Southern Pacific Railroad Co. vs. U. S., 200 U. S. 341.
Buzard vs. Houston, 119 U. S., 347.
Wehrman vs. Conklin, 155 U. S. 314.
N. Y. Guaranty & Co. vs. Memphis Water Works Co., 107 U. S. 205.
Warmath vs. O'Daniel, 159 Fed. 87, 16 L. R. A. (N. S.) 414.
Grand Chute vs. Winegar, 15 Wall. 373, 21 L. ed. 174;
Phoenix Mutual Life Insurance Co. vs. Bailey, 13 Wall 616, 20 L. ed. 501.
Bronson vs. Cook, 247 Fed. 601, 14 R. C. L. 399.

"Relief will be denied to a person who seeks the aid of a Court of equity against pending or threatened proceedings at law where it appears that the matters relied upon are such that if established would constitute a defense in the law action and where the plaintiff's right will be fully protected by a successful defense; that is, where no wrong is threatened beyond the assertion of the legal demand open as it is to such defense."

21 C. J. p. 68.

b. A Court of concurrent jurisdiction (state court) had first obtained jurisdiction and under such circumstances the

Court first obtaining jurisdiction should be allowed to exhaust it.

Authorities:

7. R. C. L. 1067, and notes 8, 9, 10 and 11.
15 C. J. 1155, Sec. 634.
15 C. J. 1161, Sec. 637.

c. The action is against the State of Iowa and to permit its maintenance would be in violation of the Eleventh Amendment to the Constitution of the United States, because there is not here, as in *Ex parte Young*, 209 U. S. 123 and the cases which follow it, any action by the officers of the state, actual or threatened, which would be an invasion of the rights of the complainant or a tresspass upon the rights of the complainant and no action whatever by the officers of the state, except the institution of a suit at law in the state court for a money judgment for the amount of motor vehicle fuel license fees alleged to be due.

Authorities:

In Re: Ayers, 123 U. S. 443.
Fitts vs. McGhee, 172 U. S. 516.
Ex parte Young, 209 U. S. 123.
Cline vs. Frink Dairy Co. 274 U. S. 445.
Fenner vs. Boykin, 271 U. S. 240.
Boynton vs. Fox West Coast Theatre Corp. 60 Fed. 2nd, 251.
Sterling vs. Constantin, et al. 287 U. S. 37.

d. Section 265 of the Federal Judicial Code prohibits

the issuance of an injunction by a federal Court to prevent prosecution of a suit in the state courts.

Authorities:

28 U. S. C. A., Sec. 379 (Sec. 265 Judicial Code).
Amusement Syndicate Co. vs. El Paso Land Improvement Co. 251 Fed. 345.
Rensselaer & S. R. Co. vs. Bennington & R. R. Co. 18 Fed., 617-618.
Higgins vs. California Prune & Apricot Growers, 3 Fed. (2d) 896.
Diggs vs. Wolcott, 8 U. S. 179.
Watson vs. Jones, 80 U. S. 679.
Haines vs. Carpenter, 91 U. S. 254.
Dial vs. Reynolds, 96 U. S. 340.
Hitchcock vs. Galveston, 96 U. S. 341.
Carlisle vs. Bundy, Fed. Cas. No. 2, 410.
City Bank vs. Skelton, Fed. Cas. No. 2, 739.
Livestock Dealers' & Butchers ass'n. vs. Crescent City Live Stock Landing & Slaughter House Co., Fed. Cas. No. 8, 408.
Evans vs. Pack, Fed. Cas. No. 4, 566.
Domestic & Foreign Missionary Soc. vs. Hinman 13 Fed. 161.
Harrison Wire Co. vs. Wheeler, 11 Fed. 206.
Chicago, R. I. & P. Ry. Co. vs. St. Joseph Union Depot Co. 92 Fed. 22.
Atlantic Coast Line R. Co. vs. Daniels, 175 Fed. 302.
The Lotta, 150 Fed. 219.
Kansas City Gas. Co. vs. Kansas City, 196 Fed. 500.
Kittredge vs. Emerson, 15 N. H. 227.
Smith vs. Jennings, 238 Fed. 48; reversing, 232 Fed. 921.
American Graphophone Co. vs. Pickard, 201 Fed. 546.

IV.

THE IOWA STATUTES LEVYING MOTOR VEHICLE FUEL LICENSE FEES ON MOTOR VEHICLE FUEL USED WITHIN THE STATE DOES NOT CREATE A BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES FOR THE FOLLOWING REASONS:

a. The tax is not levied against the product (motor vehicle fuel) at all but is an excise tax levied against the use of the product in Iowa.

Authorities:

Chapter 251-A1, Code of Iowa 1931, in Section 5098-a1 thereof, imposes a tax

"on all motor vehicle fuel used or otherwise disposed of in this state for any purpose whatsoever."

Pierce Oil Co. vs. Hopkins, 264 U. S. 137.
Standard Oil Co. vs. Brody, 157 Ark. 114, 239 S. W. 753.
Altitude Oil Company vs. People, 70 Colorado, 453, 202 Pac. 180.
Standard Oil Company vs. Jones, 48 S. D. 432, 205 N. W. 72.

b. Even though the tax were levied against the product rather than against the use of the product, it would not violate the commerce clause of the Constitution because there is no requirement that distributors either report or pay the tax until at least twenty days have elapsed after the fuel is unloaded and comes to rest in Iowa, and when products moving in interstate commerce come to rest in a state they become

subject to the tax laws of that state as other property.

Authorities:

Chapter 251-A1, Code 1931, in Section 5093-a5 thereof, which is the section requiring distributors to report, provides that distributors shall report on the twentieth of each calendar month only motor vehicle fuel received and unloaded during the preceding calendar month.

Sonneborn Bros. vs. Cureton, 262 U. S. 506.
Eastern Air Transport Inc. vs. South Carolina Tax Commission et al, 285 U. S. 147.
Gregg Dyeing Co. vs. Query, et al., 286 U. S. 472.
In Re: Opinion of Justices, 120 Atl. 629.
Bowman vs. Continental Oil Co., 256 U. S. 642.

c. The statute of Iowa taxing motor vehicle fuel does not purport to levy any tax on motor vehicle fuel sold in Iowa for use outside the State of Iowa, and distributors are permitted to deduct and do deduct all such fuel in making their reports and paying their tax.

Authorities:

Chapter 251-A1, Code of 1931, in Section 5093-a1 thereof, imposes a tax on all motor vehicle fuel used or otherwise disposed of in this state for any purpose whatsoever, and

Section 5093-a2, defines a distributor as one who brings into the state or who produces, refines, manufactures or compounds within the state any motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state.

Distributors, in making their reports, deduct sales made of motor vehicle fuel for use outside the state.

Transcript, page 296 A—Exhibit 11.

d. The statute of Iowa taxing the use of motor vehicle fuel, according to its express terms, exempts from its operation transactions in interstate commerce.

Authorities:

Chapter 251-A1, Code, 1931, in the latter part of Section 5093-a5 thereof, provides:

"Neither this act nor any of its provisions shall apply to foreign or interstate commerce."

V.

THE IOWA STATUTES DO NOT REQUIRE A DISTRIBUTOR, AS A CONDITION PRECEDENT TO HIS RIGHT TO ENGAGE IN INTERSTATE COMMERCE, TO PAY A LICENSE FEE TO THE STATE OF IOWA.

a. The license fee imposed by the Iowa statutes on motor vehicle fuel used in the state, is not an occupation tax levied against the distributor for the privilege of engaging in business as a distributor.

Authority:

Section 5093-a1, Code 1931.

1. Distributors are required to take out a permit but no charge is made therefor.

Section 5093-a4, Code, 1931.

b. If the license fees of three cents per gallon were an occupation tax, there would be no burden on interstate commerce because a distributor, as defined by the Iowa statute, is one who has motor vehicle fuel in this state FOR USE IN THE STATE OR FOR SALE FOR USE IN THE STATE. No burden would, therefore, be imposed on one engaged in interstate commerce.

Authority:

Section 5093-a2, defining a distributor.

c. If the law attempted to impose a burden on interstate commerce, by taxing sales outside the state, the only relief Appellant would be entitled to would be an injunction restraining the enforcement of the law on that interstate business.

Authority:

Bowman vs. Continental Oil Co., 256 U. S. 642.

d. But no such injunction would be justified in this case because it is conceded that no effort is made to enforce the law on that type of business.

Authority:

Appellant's Brief, page 74.

e. The incidental burden required of a person engaged in both domestic and interstate business to separate the domestic transaction from the interstate transaction for purposes of taxation, does not prevent the state from taxing the domestic business and is not a regulation of interstate commerce.

Authority:

Bowman vs. Continental Oil Co., 256 U. S. 642, and cases there cited.

f. The cases cited by Appellant holding that a tax imposed upon dealers as an occupation tax is not transformed into a consumers tax by a provision for the posting of a price placard, have no application to a situation like that in the case at bar where the tax is imposed against the consumer.

g. Provision may be made for the payment of taxes by persons other than those against whom it is levied. All collections of taxes at the source are of that nature. The right to collect from a corporation taxes levied against its stockholders has been recognized.

Authorities:

City National Bank vs. Kentucky, 217 U. S. 443.
Clement National Bank vs. Vermont, 231 U. S. 120.
Pierce Oil Co. vs. Hopkins, 284 U. S. 137.

h. The tax being one levied against use, and the object of the tax being to raise funds for road improvement, there

can be no constitutional objection to exempting (by means of refund) of the motor vehicle fuel used for purposes other than the operation of motor vehicles on the highways.

VI.

THERE IS NO DISCRIMINATION UNDER THE IOWA STATUTE BETWEEN MOTOR VEHICLE FUEL IMPORTED INTO THE STATE AND MOTOR VEHICLE FUEL MANUFACTURED OR COMPOUNDED WITHIN THE STATE, AND IF THERE WAS COMPLAINANT IS IN NO POSITION TO RAISE THAT QUESTION.

a. The tax is levied against all motor vehicle fuel used or otherwise disposed of within the state without reference to whether it came in from outside the state or was produced within the state.

Authority:

Section 5093-a1, Code, 1931.

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1. Distributors are required to report and pay on all motor vehicle fuel received from outside the state, or manufactured or compounded from materials brought in from outside the state. This is all the motor vehicle fuel

within the state, as there are no products of the state from which motor vehicle fuel can be manufactured or compounded.

2. If there were motor vehicle fuel in the state produced from materials found in the state, such fuel when used in Iowa would still be taxable under the provisions of Section 5093-a1. At most, all that can be claimed is that, while the distributor pays to the state the tax on the fuel distributed by him for domestic use and collects the amount thereof from purchasers from him, the user pays the tax on motor vehicle fuel not handled by distributors. This Court has held that that is proper.

Authority:

Gregg Dyeing Co. vs. Query, 286 U. S. 472.

b. Appellant is in no position to raise the question of discrimination because if there has been discrimination as claimed, such discrimination was in favor of Appellant as the only one who ever refined motor vehicle fuel in Iowa.

VII.

THE APPELLANT IS ESTOPPED FROM QUESTIONING THE CONSTITUTIONALITY OF THE IOWA STATUTES IMPOSING MOTOR VEHICLE FUEL LICENSE FEES.

a. Appellant filed its report and paid these license fees

over a period of years knowing that at the time the state, or its subdivisions, were incurring an indebtedness of about $100,000,000 in reliance upon the revenue from the motor vehicle fuel taxes to retire the indebtedness.

b. The Appellant has collected from the persons to whom it sold motor vehicle fuel, the amount of the license fees imposed by the Iowa statutes and now holds those fees; it cannot use the Iowa statutes as a means of collecting three cents per gallon in addition to the purchase price from purchasers of motor vehicle fuel as taxes due the state and then keep the fund by asserting the statutes are unconstitutional.

Authority:

Note 19 Ann. Cas. 175.

ARGUMENT

I.

FINDINGS OF FACT BY THE TRIAL COURT ARE BINDING ON APPEAL WHERE THERE IS ANY EVIDENCE TO SUSTAIN THEM.

The trial Court in this case filed rather elaborate and complete findings of fact and we desire to call attention at the outset to the generally accepted proposition that these findings of fact are, on appeal, presumed to be correct and

will be accepted by the appellate Court as facts established in the case unless they are clearly without support in the evidence. The following are statements of the rule by recognized authorities:

> "The general presumption on appeal is in favor of the findings of fact made by the lower Court."
> 4 C. J., 775.

> "In weighing the evidence (by the appellate court) consideration must in case there was oral evidence be given to the decision of the trial Court which is naturally in a better position to pass on the credibility of the witnesses, and all reasonable presumptions are to be indulged in favor of the correctness of its findings which will not be disturbed unless in the light of such rule it is so clearly contrary to the preponderance of the evidence as to produce in the minds of the reviewers a conviction amounting to a reasonable certainty that it is wrong, or unless the finding is plainly, flagrantly or indisputably against the evidence."
>
> 2 R. C. L., p 203.

In further support of this proposition reference is made to the following cases:

> *Parkinson vs. Thompson*, 164 Ind., 609, 73 N. E. 103, 3 Ann. Cas. 677;
> *Chase vs. Hinkley*, 126 Wis. 75, 105 N. W. 230.

In view of this rule and the further fact that no effort is made by Appellant to demonstrate that the trial Court's findings of fact are incorrect, such findings must be accepted as a verity on this appeal.

II.

THE PRESUMPTION IS ALWAYS IN FAVOR OF THE CONSTITUTIONALITY OF LEGISLATIVE ENACTMENTS AND SUCH ENACTMENTS WILL NOT BE DECLARED UNCONSTITUTIONAL UNLESS SUCH UNCONSTITUTIONALITY CLEARLY APPEARS.

It has always been the rule to declare legislative enactments constitutional if it is possible to reconcile them with the provisions of the Constitution; and where more than one interpretation of language of state statute is possible, that interpretation will be adopted which makes for constitutionality.

Ruling Case Law states the rule thus:

> "It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations by one of which the statute would be unconstitutional and by the other it would be valid, the Court should adopt the construction which would uphold it."
> 6 R. C. L., Section 77.

This Court in a case involving the constitutionality of a statute of the State of Illinois, used the following language:

> "If the object and effect of the sections were in irreconcilable conflict with the acts of Congress they would of course be invalid. But it is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law. *Parsons vs. Bedford*, 3 Pet. 433; Grenada County

Supervisors vs. Brogden, 112 U. S. 261; *Marshall vs Grimes*, 41 Mississippi, 27. If we yielded to this contention of the plaintiff in error we should render the sections invalid by giving them a strained construction, which would make them antagonistic to the law of Congress. We cannot attribute to the legislature, unless compelled to do so by its plain words, a purpose to pass an act in conflict with an act of Congress on a subject over which Congress is given authority by the Constitution of the United States."

Presser vs. Illinois, 116 U. S. 252 at 269.

And this Court has said:

"The elementary rule is that every reasonable construction must be resorted to, in order to save the statute from unconstitutionality."

Hooper vs. California, 155 U. S. 657.

To the same effect see

Knights Templars' & Masons' Life Indemnity Company vs. Jarmen, 187 U. S. 197;
Harriman vs. Interstate Commerce Commission, 211 U. S. 407;
United States vs. Delaware & H. Co., 213 U. S., 366.

It seems clear, therefore, that this Court should not hold a state statute void for unconstitutionality unless the terms of said statute present an irreconcilable conflict with the provisions of the Constitution of the United States, and that conflict clearly appears.

III.

THE ACTION BY COMPLAINANT (Appellant) IN EQUITY FOR INJUNCTIVE RELIEF ONLY IS NOT MAINTAINABLE.

Aside from the merits of this case, there are four reasons why the action is not maintainable and the Appellant is not entitled to the injunctive relief for which it prays.

1. Adequate Remedy at Law

The first reason is that no sufficient grounds for equitable jurisdiction appears, or in other words, complainant has a plain, speedy and adequate remedy at law. Attention is called to the fact that aside from the general proposition that equity will not grant relief where there is an adequate remedy at law, this Court is confronted with a specific statutory direction on the subject, being Section 267 of the Judicial Code or 28 U. S. C. A., Section 384, which is as follows:

> "Suits in equity, when not sustainable. Suits in equity shall not be sustained in any Court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Almost the identical proposition on this point was before this Court in a case arising in Idaho where a water works company had placed its property and equipment in the streets of the city in pursuance of an ordinance granting it permission to do so for a period of fifty years. At the expiration of three years the ordinance was changed and a new ordinance en-

acted imposing upon the water works company the obligation to pay $300.00 a month for the privilege of using the streets, the city taking the position that the first ordinance was merely a license which was revocable at any time and that it was revoked by a subsequent ordinance and the city brought suit at law to collect the monthly fee from the water works company. After the institution of the suit the water works company filed a petition in the federal Court asking for an injunction against the city restraining the enforcement of the second ordinance on the ground that it invaded the rights of the water works company guaranteed by the Constitution of the United States, and in dealing with that situation and the right of the complainant in that case to maintain the suit, this Court said:

> "It is obvious that the rights of which the company seeks to avail itself are rights cognizable in a Court of law, and not rights created only by the principles of equity. The sum of the company's contentions is that the imposition of the license fee was illegal, unconstitutional and void. All these contentions are open in a Court of law. It is a guiding rule in equity that in such a case it will not interpose where there is a plain, adequate and complete remedy at law. This rule at an early date was crystallized into statute form by the sixteenth section of the Judiciary Act (Revised Statutes, 723), which, if it has no other effect, emphasizes the rule and presses it upon the attention of Courts. *New York & Co. vs. Memphis Water Co.*, 107 U. S. 205, 214. It is so well settled and has so often been acted upon that no authority need be cited in its support, though it must not be forgotten that the legal remedy must be as complete, practicable and efficient as that which equity could afford. *Walla Walla vs. Walla Walla Water Co.*, 172 U. S. 111.
>
> "A notable application of the rule in the Courts of the United States has been to cases where a demand has

been made to enjoin the collection of taxes or other impositions made by state authority, upon the ground that they are illegal or unconstitutional. The decisions of the state Courts in cases of this kind are in conflict, and we need not examine them. It is a mere matter of choice of convenient remedy for a State to permit its Courts to enjoin the collection of a state tax, because it is illegal or unconstitutional. Very different considerations arise where Courts of a different, though paramount, sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this Court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state government has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the Courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity. And the rule applies as well where the right asserted is by way of defense. *Insurance Co. vs. Bailey*, 13 Wall. 616, 623.

"In order to give equity jurisdiction there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the remedy by injunction can be awarded. The leading case on the subject is *Dows vs. Chicago*, 11 Wall. 108. In that case the plaintiff sought to enjoin the collection of a tax levied upon shares of the capital stock of a national bank on the ground that the levy was unconstitutional under the state law, and that the property was not within the jurisdiction of the State. This Court declined to pass upon the validity of the tax, saying, through Mr. Justice Field (p. 109):

" 'The illegality of the tax and the threatened sale of shares for its payment constitute of themselves alone no

ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common tresspass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.' "

Boise Artesian Water Co. vs. Boise City, 213 U. S., 276 at 281.

What is said by this Court in the quotation above is equally applicable to the case at bar and the rule thus announced is supported by other cases from this Court and reference is made to the following:

U. S. vs. Bitteroot Dev. Co., 200 U. S., 451;
Southern Pacific Railroad Co. vs. United States, 200 U. S., 341;
Buzard vs. Huston, 119 U. S., 347;
Wehrman vs. Conklin, 155 U. S., 314;
N. Y. Guaranty & Indemnity Co. vs. Memphis Water Works Co., 107 U. S. 205;
Warmath vs. O'Daniel, 159 Fed. 87, 16 L. R. A. (N. S.) 414;
Grand Chute vs. Winegar, 15 Wall. 373, 21 L. Ed. 174;
Phoenix Mutual Life Insurance Co. vs. Bailey, 13 Wall. 616, 20 L. Ed. 501;
Bronson vs. Cook, 247 Fed. 601, 14 R. C. L. 399.

It will be recalled that in the case at bar, an action at law had been instituted by the state for the license fees in

controversy and that it was to prevent the prosecution of that suit on the ground that the statutes on which it was based were unconstitutional and void that this suit was brought. In other words, the matters herein alleged as grounds for an injunction could properly be urged as a defense in the action previously commenced. Under those circumstances, equity will not grant an injunction. The rule is well expressed in Corpus Juris as follows:

> "Relief will be denied to a person who seeks the aid of a Court of equity against pending or threatened proceedings at law where it appears that the matters relied upon are such that if established would constitute a defense in the law action and where the plaintiff's right will be fully protected by a successful defense. That is, where no wrong is threatened beyond the assertion of the legal demand open as it is to such defense."
> 21 C. J. 68.

It is claimed by Appellant in support of the claim of equity jurisdiction that complainant's license had been revoked and that it became subject to great penalties. The trouble with this contention is that it is not sustained by the facts.

In the first place, there is no provision in the Iowa statutes whatever imposing a penalty upon a distributor doing business without a license. It is provided in Chapter 251-A1 and in Section 5093-a4 thereof, that a distributor shall, before beginning the sale or manufacture of motor vehicle fuel, file a certificate with the treasurer of state, which statement is in the nature of an application for a license. It also provides that he shall procure the license. Section 5093-c2 requires that he furnish bond or other security to the state. Section 5093-a5 requires certain reports to be made to the

state. The only penalty provision in the act is found in Section 5093-a7, which is as follows:

> "Misdemeanor-penalty. Any distributor railroad or transportation company or agent of a railroad or transportation company who shall fail to make, or refuse to make the reports or certificate to the treasurer as herein prescribed, or shall refuse to permit the treasurer to examine the books, records, papers, receipts, invoices or equipment of such distributor pertaining to the sale of motor vehicle fuel, or who shall make any incomplete, false or fraudulent return hereunder, or shall in any manner violate the provisions of Sections 5093-a4, 5093-a5, and 5093-b1 hereof shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars. If a distributor is a corporation and fails to comply with the provisions of this chapter, each principal officer thereof shall be deemed guilty of a misdemeanor and shall each be subject to punishment therefor."

It will be noticed from the foregoing that the only acts of the distributor which subject him to a penalty is his refusal "to make the reports or certificate to the treasurer as herein prescribed or shall refuse to permit the treasurer to examine the books, papers, receipts, invoices or equipment of such distributor pertaining to the sale of motor vehicle fuel, or who shall make any incomplete, false or fraudulent return hereof or shall in any manner violate the provisions of Sections 5093-a4, 5093-a5 and 5093-b1 hereof."

Said section further provides that upon conviction, he shall be fined not less than one hundred dollars nor more than five hundred dollars.

It is submitted that it is questionable whether, under this act, if a distributor has filed the certificate required by the act and has filed the security required by the act and makes his report as required by the act, he could be subjected to the penalties of the act for doing business without a license. But however that may be, it is undisputed in this case that no proceedings, criminal or otherwise, were contemplated or pending against the complainant on account of its continuing to do business without a license. The officers of the state testified at the trial and the trial Court found it as a fact that the state intended to take no proceedings to interfere with the business of the complainant until the Courts had finally determined the amount of motor vehicle fuel taxes owing by the complainant and the complainant had refused to pay them.

The trial Court found the facts with reference to that matter as follows:

> "12th. The officers of the state of Iowa have no intention of further law actions or criminal actions against the Mona Motor Oil Company until the present litigation is terminated and the rights of the officers in the collection of the tax determined by the Courts in the present proceedings." Tr. p. 130.

And attorneys for Appellant on the trial conceded the only purpose of this suit was to restrain the state from maintaining its suit in the state Court against the Mona Motor Oil Company. The present State Treasurer as a witness was being cross-examined by one of the attorneys for complainant (Appellant) and inquired as to whether this suit was being prosecuted to determine whether the state was within its rights

in prosecuting the suit in the state Court, and the answer was: "I think so." Transcript p. 204.

In view of that state of the record and that finding of the Court there can be no justification for invoking equitable jurisdiction.

b. Concurrent Jurisdiction

The second reason why the suit is not maintainable is that it involves the same questions which are properly involved in the suit started by the state against the Mona Motor Oil Company in the state Court claiming license fees on motor vehicle fuel due the State of Iowa, and it is well settled that as between Courts of concurrent jurisdiction the Court which first obtains jurisdiction will be allowed to exhaust it.

The following quotations are submitted as correct statements of the rule:

> "It is a familiar principle that, when a Court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no Court of co-ordinate authority is at liberty to interfere with its action."
>
> 7 R. C. L., 1067.
>
> "In a great number of instances the federal and state Courts have concurrent jurisdiction. Generally, whenever a legal right arises and the state Court is competent to administer justice, the right may be asserted in such Court, although the federal Court may have concurrent

jurisdiction unless the jurisdiction is limited by law to the federal Courts."

15 C. J., 1155, Section 634.

And again

"Where a state and federal Court have concurrent jurisdiction over the same parties or privies and the same subject matter, the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction and to decide every issue or question properly arising in the case."

15 C. J. 1161, Section 637.

It will hardly be contended that the question as to whether or not the Mona Motor Oil Company owes any motor vehicle fuel tax to the State of Iowa does not depend upon the constitutionality of its law imposing the tax; and it will hardly be contended either, that all provisions of the Constitution of the United States, as well as the State of Iowa, are binding upon the state court the same as they are upon this and every other court within the jurisdiction of the United States. The only effect and the only purpose in instituting this action is to have determined the very questions which are not only properly but necessarily involved in the suit previously commenced against complainant in the State Court. In other words, the practical effect of the maintenance of this suit was to transfer the determination of those questions from the Court in which the action was pending to the federal court. And this, too, when the suit in the state court was brought by the State of Iowa against the Mona Motor Oil

Company and the removal of the case was sought and denied because of the fact that there was no diversity of citizenship on account of the state being a party to the suit.

In view of this situation, it is respectfully urged that the case at bar is not maintainable and the complainant (Appellant) should not be granted the injunction for which it prays.

c. Suit Against the State

The third reason why the suit is not maintainable is that it is in effect a suit against the state and its maintenance would be in violation of the Eleventh Amendment to the Constitution of the United States. We are well aware of the fact that under some circumstances federal courts will take jurisdiction of a suit against state officers to enjoin the enforcement of a state statute on the ground that the statute contravenes provisions of the Constitution of the United States. But we are equally well aware of the fact that the constitutionality of state statutes cannot be tested in that way in every case and that certain conditions must exist as a basis for federal jurisdiction and as grounds for distinguishing the case as being a suit against the officers of the state rather than the state itself.

The rule has been repeatedly stated by this Court and in the cases of *Re Ayers*, 123 U. S. 443, and *Fitts vs. McGhee*, 172 U. S., 516, relief was denied on the ground that it was a suit against the state.

In the case of *Ex parte Young*, 209 U. S. 123, the right

to maintain the suit against the Attorney General of the State of Minnesota was recognized by a divided Court but the basis of the Court's jurisdiction was clearly stated. It is recognized in that case and in every case by this Court where the matter has been discussed, that there must be present in the case some action by the officers of the state which would be illegal and a tresspass upon rights guaranteed to the complainant by the Constitution of the United States such as would justify an injunction against them as individuals before a Court will entertain jurisdiction in such a case. The suit then becomes one against the individual officers restraining them from injuring rights of the complainant and it is very possible and proper to say that in such a case the suit is against the officers rather than against the state. The trial Court quoted the rule from a recent opinion of this Court as follows:

> "The District Court had jurisdiction. The suit is not against the state. The applicable principle is that where state officials purporting to act under state authority invade rights secured by the Federal Constitution they are subject to the process of the federal courts in order that the persons injured may have appropriate relief."
>
> *Sterling et al, vs. Constantin*, 287 U. S. 378.

We have no quarrel with this statement of the rule but we do desire to inquire what rights of complainant, secured by the Federal Constitution, were invaded by the state officers in this case. Surely, it cannot be claimed that the institution in a perfectly lawful manner of a suit in the state Court asking for the enforcement of a statute and for a money judgment for an amount alleged to be due in accordance with the terms of the statute was any invasion of the rights of complainant guaranteed by the Constitution of the United States. There

must be something more than that. There must be something in the nature of a tresspass upon the rights of the complainants or an interference with their liberty, or their person, or their property before there is a situation which makes the suit one against the officers rather than one against the state itself.

It will be borne in mind that in this case the criminal prosecutions which had been initiated against the Mona Motor Oil Company and its officers had all been terminated before the case at bar was instituted, and that at the time the case at bar was instituted no criminal prosecutions were pending or threatened and that that fact was found by the trial Court.

It should further be borne in mind that there was no seizure of the property of the Mona Motor Oil Company and no attempt to interfere with the complete liberty of the Mona Motor Oil Company to have the possession, enjoyment and use of all its property, both personal and real, and there was no threat to prosecute or in any way to interfere with the liberty or freedom of action of the agents and employees of the Mona Motor Oil Company. The criminal prosecutions were all over before this action was commenced. In other words, there was no invasion of rights of the Mona Motor Oil Company secured by the Federal Constitution and nothing which would justify an injunction against the officers of the state restraining them as individuals from invading rights of the Mona Motor Oil Company secured by the Constitution of the United States and nothing, therefore, which would justify an attempt to distinguish this case as a case against the officers of the state rather than a case against the state itself. Under such circumstances, it is submitted that the

case must be regarded as one against the state and its maintenance in violation of the clear and plain provisions of the Eleventh Amendment to the Constitution of the United States which prohibits suits in the federal court against any state by a citizen of another state.

d. Restraing Suit in State Court Prohibited

The fourth reason why the suit cannot be maintained is that the suit is expressly prohibited by the terms of the federal statute. Section 265 of the Judicial Code is as follows:

> "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."
>
> 28 U. S. C. A., Section 379.

It will be recalled that this suit was commenced against the state officers asking for an injunction against them restraining them from enforcing the motor vehicle fuel tax laws of the State of Iowa at a time when the only thing the officers were doing, and the only thing they were contemplating doing, was the prosecution of the action at law previously commenced in the state court for a money judgment in accordance with the terms of the statute. And the only effect of granting the injunction would be to restrain prosecution of that action in the state court, and it is submitted that such an injunction would directly violate the above quoted section of the Judicial Code. It will be observed from the opinion of the

Court below, and particularly from the part thereof appearing at the bottom of page 91 and top of page 92 of the Transcript, that it was held that the suit was not maintainable on account of this provision of the statute and that the only reason the Court was constrained to proceed with an examination of the constitutionality of the statute was because of the fact that other cases involving the same question were pending and it was thought desirable that that question should be passed upon.

The trial Court in its findings and on page 92 of the Transcript said:

> "We are, therefore, expressly enjoined from interfering in any way with the proceedings now pending in the state court by the state or its officers in this case involving the same parties and the same subject matter."

The Court in its findings of fact and conclusion of law further said:

> "11th. That to grant the relief asked by the complainant in this case would interfere with the proceedings in the state court by injunction, prohibited by the Judicial Code."

Transcript p. 132.

Appellant in this case takes no exception to that finding and predicates no error upon that statement of the trial Court. Under such circumstances it is difficult to see how the correctness of the trial Court's ruling on that point is before this Court for review, and since the injunction for which Appellant prayed in this case could not be granted

without restraining the prosecution of that suit, and since the only purpose which the injunction would serve would be to restrain the prosecution of that suit, it is difficult to see how it can be claimed that there was error in the trial Court's refusal to grant the injunction prayed for by Appellant below on that ground.

IV.

THE IOWA STATUTES LEVYING MOTOR VEHICLE FUEL LICENSE FEES ON MOTOR VEHICLE FUEL USED WITHIN THE STATE DO NOT TAX FUEL IN INTERSTATE COMMERCE AND DO NOT ON THAT ACCOUNT CREATE A BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

It is claimed by Appellant that the Iowa statute and the manner in which it is administered imposes a tax on motor vehicle fuel in interstate commerce and thereby creates a burden upon interstate commerce in violation of the commerce clause of the Constitution of the United States, and in connection with this claim several different propositions are urged by Appellant and must be considered.

a. TAX LEVIED ON THE USE.

It is claimed by Appellant that the Iowa statutes impose a property tax on motor vehicle fuel and this claim is made as

a necessary premise to the conclusion that the tax is against property imported into the state. This premise, however, can hardly be sustained because the tax is not levied upon property but upon the use of a certain product and is measured by the amount thus used. The language of the section imposing the tax is that a license fee is imposed *on all motor vehicle fuel used or otherwise disposed of within the state.* It was held by the trial Court to be an excise tax upon the use of the product. And Courts quite uniformly have held that taxes imposed upon motor vehicle fuel in that language are excise taxes levied against the use of the product and not a property tax levied against the property itself.

In the case of *Altitude Oil Company vs. People*, 70 Colo. 452, the Court had under consideration the nature of a tax imposed for the purpose of improving the highways. The statute levied the tax on various products of petroleum "offered for sale or used for consumption for power purposes in propelling motor vehicles." The Court after calling attention to the fact that the tax was not levied on all the products but only such as were devoted to a particular purpose and the further fact that it was measured, not by the value of the property but by the quantity used, said:

> "Considering the statute as a whole, we conclude that it imposes an excise tax and not a property tax."

In the case of *Bowman vs. Continental Oil Co.*, 256 U. S., 642, a tax was levied on each gallon of gasoline sold or used within the state. And it was held by this Court that the tax was an excise tax, not a property tax.

In *Standard Oil Company vs. Jones* (S. D.), 205 N. W., 72, a tax was levied amounting to three cents per gallon on all motor vehicle fuel sold or used in the State of South Dakota. Dealers were required to pay the tax. The Court in considering the nature of the tax, decided it was not a property tax. The Court said:

> "A careful study of this act convinces us that the true object and purpose of this act is to tax users of gasoline in the state 3 cents per gallon through the agency of a dealer's tax. Every provision is to effect this result, to avoid any interference with interstate commerce, and to permit of no discrimination. The justice of the tax is in its collection for the construction and maintenance of highways, from the users of such highways, in proportion to the use."

See also

Standard Oil Co. vs. Brody, 157 Ark. 114.

If the tax is levied against the use of the product within the state as an excise, as all the cases dealing with the subject including the cases from this Court hold, and is levied uniformly against all motor vehicle fuel used within the state without reference to its place of origin, it cannot possibly, of course, be claimed that it creates a burden upon interstate commerce.

b. PRODUCTS WHICH MOVE IN INTERSTATE COMMENCE MAY BE TAXED WHEN THEY COME TO REST.

If we treat the tax as one levied against property, for

the sake of the argument, still, there would be no burden created upon interstate commerce for the very obvious reason that distributors, under the provisions of Section 5093-a5, are not required either to report to the state treasurer or pay to the state treasurer any license fee until at least twenty days after the motor vehicle fuel has been unloaded from the tank cars or other receptacles in which it is brought into the state. That section provides that on the twentieth of each calendar month the distributor shall report the motor vehicle fuel received by him during the preceding calendar month, together with date of unloading. So that until said fuel is unloaded there is no liability whatever to report or pay the tax, and there is no liability to report and pay the tax until at least twenty days after said fuel is unloaded. In view of this situation there is no burden on interstate commerce and no attempt to tax fuel while in interstate commerce and no attempt to require the distributor to pay the tax until at least twenty days after the fuel has come to rest in the State of Iowa. Many decisions by this Court are to the effect that when articles moving in interstate commerce come to rest in the state they become subject to the tax laws of that state.

In *American Steel & Wire Co. vs. Speed*, 192 U. S., 500, that question was exhaustively considered by this Court and the rule established by the case is well stated in the syllabus as follows:

> "Goods brought in original packages from another State, after they have arrived at their destination and are at rest within the State, and are enjoying the protection which the laws of the State afford, may, without violating the commerce clause of the Constitution, be taxed without discrimination like other property within the State, although at the time they are stored at a distributing

point from which they are subsequently to be delivered in the same packages, through the storage company to purchasers in various states."

It will be noted that the rule of the foregoing case applies to goods in original packages which is a far more serious question than exists in the case at bar, because in the case at bar there is no requirement that goods be subjected to the tax until the 20th of the calendar month following the calendar month in which they were unloaded from the receptacles in which they moved in Interstate commerce.

In *Sonneborn Bros. vs. Cureton*, 262 U. S. 506, a statute of Texas imposed an occupation tax of two per cent on the gross sales of dealers in certain petroleum products. The question arose as to whether the tax could be collected on sales of oil in Texas by non-resident merchants who had shipped the oil from New York and stored it in their warehouses in Texas and afterwards sold it therefrom in unbroken original packages. In answering that question, Chief Justice Taft, speaking for the Court, said:

"Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants, and had become a part of their stock, with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil (509) as property, or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject.

"This has been established so far as property taxes on the merchandise are concerned by a formidable line of authorities: *Brown vs. Houston,* 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Coe vs Errol,* 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Pittsburg & S. Coal Co. vs. Bates,* 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *Diamond Match Co. vs. Ontonagon* 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; *American Steel & Wire Co. vs. Speed,* 192 U. S. 500, 520, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365; *General Oil Co. vs. Crain,* 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; *Bacon vs. Illinois,* 227 U. S. 504, 57 L. ed. 615, 33 Supt. Ct. Rep. 299."

There can hardly be need for the citation of further authority on a proposition so well established by holdings of this Court.

Since a state has the power by a nondiscriminatory tax to tax products coming into the state when they come to rest in the state, even though in the original packages without creating a burden on interstate commerce, it can hardly be seriously urged that the state is without power to so tax twenty days after they have been removed from the original packages without burdening interstate commerce.

c. IOWA STATUTE DOES NOT COVER FUEL SOLD FOR USE OUTSIDE THE STATE.

It is further urged by Appellant that the act burdens interstate commerce because it applies to motor vehicle fuel sold in interstate commerce, that is, sold for use outside the State of Iowa and to be shipped in interstate commerce. This

claim can neither be sustained by the language of the act nor the manner in which it is administered. The section imposing the tax being Section 5093-a1 does so in these words:

> "A license fee * * * is hereby imposed on all motor vehicle fuel used or otherwise disposed of in this state for any purpose whatsoever."

The following section in defining a distributor does so in this language:

> "Any person who brings into the state or who produces, refines, manufactures, or compounds within the state any motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state."

The trial Court held that the tax was imposed, not upon sales, but only upon the use of the product and that the term "otherwise disposed of" did not include sales but only some disposition in the nature of use so that if the tax is imposed only upon motor vehicle fuel USED IN IOWA, as provided by Section 5093-a1, it can have no application to motor vehicle fuel that is sold in Iowa for use in some other state, and no attempt is made by the administrative officers of the state to impose the tax on products sold for use outside the state. Moreover, it will be noticed that a distributor is one who brings into the state or manufactures or produces within the state motor vehicle fuel for use in the state or "to be * * * sold by him within the state for use in the state." It is therefore clear that one who brings into the state or produces within the state, motor vehicle fuel to be sold for use outside the state is not a distributor at all as that term is defined by the

Iowa statute and is not required to either report or pay on such fuel.

The form of report made by distributors to the State of Iowa calls for a deduction of all motor vehicle fuel sold for use outside the state, and distributors make that deduction paying only on motor vehicle fuel sold for use within the state.

It is obvious, therefore, that neither the language of the statute imposing the tax and defining the persons made liable for the payment of the tax, nor the manner in which the tax is administered have any reference to fuel which is sold for delivery and use outside the State of Iowa.

d. INTERSTATE TRANSACTIONS EXEMPT.

It should further be noted that the act specifically exempts transactions in interstate commerce. Section 5093-a5, in the latter part thereof, provides:

> "Neither this act nor any of its provisions shall apply to foreign or interstate commerce."

It is apparent that all transactions in interstate commerce are by the language of the act, as above quoted, and the manner in which it is administered, as previously described in this brief, exempt from the operation of the act.

V.

THE IOWA STATUTES DO NOT REQUIRE A DISTRIBUTOR, AS A CONDITION PRECEDENT TO HIS RIGHT TO ENGAGE IN INTERSTATE COMMERCE, TO PAY A LICENSE FEE TO THE STATE OF IOWA.

In the preceding division of this argument, we have attempted to show that there is no burden on interstate commerce created by the motor vehicle fuel tax laws of the State of Iowa, because of the tax being a property tax imposed upon property in interstate commerce, and that the statute has no application to motor vehicle fuel sold for delivery outside the state, and that under the terms of the statute, all transactions in interstate commerce are exempt. It is claimed, however, by Appellant that the Iowa statute in question is a burden on interstate commerce because it requires a distributor to secure a license or permit and to pay the gallonage tax on all motor vehicle fuel distributed without reference to whether such business is a purely domestic business or an interstate business. In other words, it is Appellant's claim, as set out commencing on page 68 of its argument, as we understand it, that a distributor is required to take out a permit and pay license fees to the State of Iowa as a condition precedent to his being permitted to engage in interstate commerce. If this is true, of course, it constitutes a serious indictment against the law, but we submit that it cannot be sustained either by the provisions of the statute or the manner in which it has been interpreted and is being administered by the officers of the state.

To support Appellant's claim at this point, it is of course

necessary for it to urge that the motor vehicle fuel tax law of the State of Iowa is, in fact, an occupation tax imposed upon the distributor for the privilege of engaging in that kind of business, and that the tax so imposed is measured by the amount of gallons handled by such distributor. We quote from page 68 of Appellant's Argument:

> "The tax is not upon the gasoline as it comes to rest, but is on the privilege of the distributor to do business. Where the distributor is exporting the gasoline to another state, the license fee nevertheless must be paid by him. On this interstate business the license fee is levied indiscriminately on the distributor regardless of interstate and intrastate business."

This statement is a little shocking in view of Appellant's statement in Point II in its specification of error appearing on page 30 of its printed brief. It is there asserted that Chapter 251-A1

> "undertakes to levy a 2 cent tax per gallon on imported gasoline or imported motor vehicle fuel, it is a tax on such imported property and as such on imports."

Both contentions of Appellant, of course, cannot be true. If the tax is a property tax levied on gasoline or motor vehicle fuel it cannot be an occupation tax levied against the distributor for the privilege of engaging in business as such distributor. The situation strongly suggests that Appellant is not quite settled in its own mind as to what is the matter with these Iowa statutes. It seems certain of one thing only, and that is that there must be something wrong with them, and it is perfectly willing to advance inconsistent assaults

upon the statutes in the hope that it may discover something that has merit in it.

The claim that the Iowa motor vehicle fuel tax is an occupation tax levied against distributors is utterly without support. We have already called attention to the fact in preceding divisions of this argument as to the nature of this tax and that it is an excise tax levied upon the use of motor vehicle fuel. There is not a word in the statutes imposing the tax upon the distributor, the tax is imposed upon the user. At the risk of repeated repetition, we quote the provisions of Section 5093-a1 again:

> "A license fee of two cents per gallon or fraction of a gallon is hereby imposed on all motor vehicle fuel used or otherwise disposed of in this state for any purpose whatsoever. Any person using motor vehicle fuel within the state shall be liable for the fee herein provided for unless the same shall have been previously paid."

Moreover, even though the tax were an occupation tax, it is very doubtful whether the statute would be subject to the criticism which Appellant levels against it because in defining the term "distributor" the legislature was very careful to limit it to a person doing a purely domestic business. A distributor is defined by Section 5093-a2 of the act as being

> "any person who brings into the state or who produces, refines, manufactures or compounds within the state any motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state."

It will be noticed that a distributor is not defined as any

person who imports motor vehicle fuel, as Appellant contends. On the contrary, a distributor, according to this statute, is one who has motor vehicle fuel in this state, either imported from outside the state or produced within the state, and who has such fuel for the purpose of use within the state or for sale for use within the state. This clearly and unmistakably eliminates the one who merely imports motor vehicle fuel, and when the word "imported" is used in this argument, it has reference to an interstate shipment from another state into this state rather than imports in its more technical meaning.

It is obvious also that this definition eliminates as distributors those who have motor vehicle fuel for sale outside the state of Iowa. In other words, a resident of Iowa could receive into this state from outside the state and sell in this state for delivery outside the state; or in other words, could carry on an interstate distributing business without coming within the terms of the definition of a distributor as contained in the statute at all. It follows that since a distributor is one who carries on a domestic distributing business as distinguished from an interstate business, as that term is defined in the Iowa statute, there is no merit in the claim that the license fees are exacted by the State of Iowa as a condition precedent to the right of a distributor to engage in interstate commerce.

Counsel for Appellant concede that the manner in which the law is being administered does not create any burden upon interstate commerce. We quote from page 74 of Appellant's printed Brief:

"But the state officers say, 'We give you credit for all

gasoline used in Nebraska.' Where is the provision in the law for such a credit?"

And the Appellant proceeds to argue that it is what may be done under the law which makes it bad rather than what is actually done under it.

As to Appellant's question in the above quotation as to where the authority is for giving credit to distributors for sales made by them of motor vehicle fuel for use in Nebraska, it is sufficient to say that there is no authority in the law for levying the tax. It was heretofore pointed out that the tax is levied by Section 5093-a1 against motor vehicle fuel used in Iowa, and a distributor, as defined in Section 5093-a2, is among other things, one who sells motor vehicle fuel for use in Iowa and if it is sold by a distributor for use in Nebraska, then in the making of that transaction the seller is not acting as a distributor at all.

The case of *Bowman vs Continental Oil Company*, 256 U. S. 642, decided by this Court, it seems to us disposes of this whole proposition. In that case an excise tax of two cents per gallon was imposed upon the sale or use of gasoline, and in addition, dealers in gasoline were required to be licensed and pay a license fee of $50.00. The machinery of the statute was, as will be observed, very similar to that set up in the case at bar. Under the statute in question in the instant case, provision is made for distributors to secure a permit or license but no charge is made for such license, and an excise tax is levied on the use of motor vehicle fuel. In the Bowman case supra, it was decided that the requirement with reference to licensing dealers applied to dealers engaged in interstate

business as well as domestic business, and could not, therefore, be enforced but that the excise tax levied against domestic sale or use did not interfere with interstate commerce and could be enforced. The Court said:

> "Assuming that, upon the question of construction, the District Court was right, and that the act manifests an intent to tax interstate as well as domestic transactions in gasoline, and is not in this respect capable of separation, still, so far as the excise tax is concerned, imposed as it is upon the sale and use of gasoline according to the number of gallons sold and used, the divisible nature of the subject renders it feasible to control the operation and effect of the tax so as to prevent it from being imposed upon sales in interstate commerce, while allowing the State to enforce it with respect to domestic transactions; and with the allowance of an injunction limited accordingly plaintiff will receive the full protection to which it is entitled under the Constitution of the United States. The applicable rule is that laid down in *Ratterman vs. Western Union Telegraph Co.*, 127 U. S. 411, where, in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment, was wholly invalid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this Court unanimously answered that so far as levied upon receipts derived from interstate commerce the tax was void, but so far as levied upon receipts from commerce wholly within the State it was valid. This case has been cited repeatedly with approval and its principle accepted. *Western Union Telegraph Co. vs. Alabama*, 132 U. S. 472, 476-477; *Lehigh Valley R. R. Co. vs. Pennsylavania*, 145 U. S. 192, 200-201; *Postal Telegraph Cable Co. vs. Charleston*, 153 U. S. 692, 697; *Western Union Telegraph Co. vs. Kansas*, 216 U. S. 1, 31.
>
> "But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal

operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of *Leloup vs. Port of Mobile*, 127 U. S. 640, 647; *Crutcher vs. Kentucky*, 141 U. S. 47, 58-59; *Williams vs. Talladega*, 226 U. S. 404, 419; and other cases of that character."

And further the Court said:

"No doubt the State might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the State has not done this by any act of legislation."

It is clear from this case that even if the Iowa statute required a license fee for a permit to engage in business, which it does not, and even though the permit was required of those who engage in interstate business as well as a domestic business, which is not, still the only thing the Court could properly do about it would be to restrain the state officers from enforcing the provisions with reference to requiring permits of distributors. The question of the obligation to pay the excise tax on the motor vehicle fuel used in the state would not be affected, and that is the only thing in dispute here.

It is submitted that the definition of a distributor as provided in the Iowa statute includes only distributors doing a domestic business and has no application to interstate business. And further, that if it did, it would not under the authority of the Bowman case, affect or interfere with the obligation to pay the excise tax on the domestic business.

The most that could possibly be claimed by Appellant is that a distributor if engaged in an interstate as well as a domestic business, is required to report his sales outside the State of Iowa, and that such reporting is a burden on interstate commerce. But state laws are not held to violate the commerce clause of the Constitution because they incidentally affect interstate commerce. *East Ohio Gas Co. vs. Tax Commission*, 283 U. S. 465. The inspection laws are good illustrations of that fact. And finally this Court held in *Bowman vs. Continental Oil Co.* 256 U. S. 642, and the cases therein cited, that if a tax is levied on all tranactions both domestic and interstate, that it will be enforced as to the domestic transactions, although void as to the interstate transactions, which means that the taxpayer can be required to separate them for the purposes of taxation, and that is all at most, required by the Iowa statute of a distributor, who in addition to being a distributor within the meaning of the statute, is also engaged in interstate commerce. That may be an incidental interference with interstate commerce, but it is not a regulation of interstate commerce.

Appellant cites a number of cases in support of the proposition that the license fees are levied as a condition precedent to the right to do an interstate business. The case of *Bowman vs. Continental Oil Co.*, 256 U. S. 645, has already been discussed. The other cases cited fall far short of sustaining Appellant's contention. A brief reference to those cases will show they are inapplicable to the facts in the case at bar.

In *Furst vs. Brewster*, 282 U. S. 493, cited by Appellant, a statute of the State of Arkansas provided in substance that

no foreign corporation could recover a judgment in the Courts of the state unless it complied with a state statute requiring it to file a statement of its assets and liabilities and designated an agent for the service of process. The question arose as to whether a debt due an Illinois corporation under a contract to furnish goods from its warehouse in Tennessee to a resident of Arkansas could be enforced in the state Courts of Arkansas. It was held that a state statute attempting to prevent the enforcement of the right to payment for the goods was a burden on interstate commerce, that the right to collect for the transaction was a part of the transaction itself, and could not be taken away without creating a burden on the interstate transaction.

That question is not in the case at bar and there is nothing in the case at bar comparable to it.

In the *Eureka Pipeline Co. vs. Hallahan*, 257 U. S., 265, relied upon by Appellant, the question was whether the state of West Virginia could levy an occupation tax on the pipeline company measured by the amount of oil flowing through the pipes.

Held that as applied to oil flowing in interstate commerce, the statute was void as a burden on interstate commerce. The opinion was by a divided Court, the minority taking the view that the movement of the oil in question through the pipeline, under the circumstances, in the particular case, was intrastate business rather than interstate business. The rule of the case is that a state cannot levy an occupation tax against a pipeline operator measured by the flow of oil through the pipe line in interstate commerce. The

correctness of that rule is conceded. But it applies to an occupation tax measured by the volume of oil flowing in interstate commerce. No such situation exists in the case at bar.

In *East Ohio Gas Co. vs. Tax Commission*, 283 U. S. 465, cited by Appellant, the question was whether a state had a right to levy a consumption tax on gas which came into the state through an interstate pipe line having a direct connection with the gas consuming devices in the state, and through which gas flowed in a continuous flow from outside the state to the consuming devices. It appeared, however, that when the gas was pumped into local mains for distribution to consumers, its pressure was reduced and it was in a sense, taken out from the main flow of gas in the main interstate pipe line and isolated for local consumption.

Held that the consumption tax was valid, and that when the gas was delivered into the pipe lines of the consuming city or community, it was no longer in interstate commerce and was subject to the tax.

It is a little difficult to see why Appellant would cite this case. If gas in the cited case becomes subject to tax when it enters the pipe lines of the consuming community, then certainly motor vehicle fuel may be subjected to the tax twenty days after it is unloaded into bulk tanks in the consuming state.

In *Ozark Pipe Line Co. vs. Monier*, 266 U. S., 555, the Ozark Pipe Line Company operated a pipe line through which oil was transported to Illinois from Oklahoma and Kansas

through Missouri. No oil was received in Missouri nor delivered there. The State of Missouri attempted to levy a franchise tax against all foreign conporations engaging in business in Missouri equal to one-tenth of one per cent of the par value of its capital and surplus employed in business in Missouri, and for the purpose of the tax to deem as employed in Missouri

> "that proportion of its entire capital and surplus that its property and assets in this state bears to all its property and assets wherever located."

Held the tax was a privilege or occupation tax levied on the right to do business and that since the business was wholly interstate, the tax was a burden on interstate commerce.

In *International Paper Co. vs. Mass.*, 246 U. S. 135, relied upon by Appellant, the state levied an excise tax as a condition of admitting a foreign corporation to do business in the state, based on the amount of its authorized capital stock without limit.

Held that as applied to a foreign corporation the bulk of whose capital was employed outside the state and in interstate commerce, the tax was a burden on interstate commerce and void.

In *Helson vs. Kentucky*, 279 U. S., 245, the question was as to whether the State of Kentucky could collect a tax based on sale or use of gasoline in the state from the operators of a ferry boat across the boundary waters between Kentucky

and Illinois when the gasoline so used was purchased in Illinois.

Held that tax could not be collected.

In *Pierce Oil Company vs. Hopkins*, 264 U. S. 137, a state statute of Arkansas required dealers in gasoline to collect one cent in addition to the purchase price on all gasoline to be used on the highways and pay it into the public treasury. It was claimed the statute violated the due process clause of the Fourteenth Amendment and was void for uncertainty. It was held that the statute was valid.

In *Texas Company vs. Brown*, 258 U. S. 466, the validity of the Georgia state inspection laws with reference to certain petroleum products was involved. It was held that a state within its powers in requiring inspection of inflammable petroleum products within its borders even though in interstate commerce, if the fee charged was reasonably comparable to the expense involved and that as to products which had come to rest in the state, the state had the power to make the inspection fee a revenue measure.

Askern vs. Continental Oil Company, 252 U. S. 444, was an appeal from an interlocutory order in the same case as *Bowman vs. Continental Oil Co. supra*, and involves the same statute.

Standard Oil Co. vs. Graves, 249 U. S. 389, involved the validity of a state inspection statute. It was held that since the inspection fee exceeded the cost of inspection the act was void since it applied to products in interstate commerce.

Sonneborn Bros. vs. Cureton, 262 U. S. 506, involved the validity of an occupation tax levied against wholesalers of gasoline measured by the amount of sales.

Held valid as to all sales for delivery in the state, even sale in original package made after it came to rest in the taxing state.

Brown vs. Maryland, 7 U. S., 262, held that a statute imposing an occupation tax on a person engaged in importing foreign goods for sale in original package was void as a burden to interstate commerce.

Pierce Oil Co. vs. Hopkins, 282 Fed. 253, is the same case as the one with like title decided by the Supreme Court of the United States and reported in 264 U. S. 137.

In *Central Transfer Co. vs. Commercial Oil Co.*, 45 Fed. (2d) 400, decided by the United States District Court of Missouri, the question was whether the State of Missouri could levy a tax as against motor vehicle fuel purchased by complainant in Missouri for use in interstate commerce. It was held that the tax could be imposed.

None of the cases are authority for the proposition for which they are cited by Appellant, that the enforcement of the motor vehicle fuel tax laws like those of the State of Iowa imposes taxes which are a condition precedent to the right of a distributor to engage in interstate commerce. On the contrary, those cases cited which deal with the proposition at all, even remotely, sustain the right of the State of Iowa

to enforce its motor vehicle fuel tax laws. *East Ohio Gas Co. vs. Tax Commission*, 283 U. S. 465, *Pierce Oil Co. vs. Hopkins*, 264 U. S. 137, *Texas Co. vs. Brown*, 258 U. S. 466, *Bowman vs. Continental Oil Co.*, 256 U. S. 642, *Sonneborn Bros. vs. Cureton*, 262 U. S. 506, and *Central Transfer Co. vs. Commercial Oil Co.*, 45 Fed. (2d) 400, are the only cases cited which deal with the specific questions involved in the case at bar and they are all in complete harmony with the contention of Appellees herein.

Counsel for Appellant devote a considerable portion of their argument (commencing on page 55) to an attempt to demonstrate that a provision such as that contained in the Iowa statute requiring retail sellers of motor vehicle fuel to post a placard advising the public that the price includes the motor vehicle fuel license fees payable to the State of Iowa, does not change a tax levied as an occupation tax into a consumption tax levied against consumers. It is not necessary to quarrel with any of the cases cited by Appellant on that proposition. And it may be conceded that such a provision alone is not sufficient to transform what is otherwise clearly an occupation tax levied against persons engaged in a certain occupation for the privilege of engaging in that occupation into a consumers tax levied on the use and consumption of certain products. But attention is called in this connection to the fact that the Iowa statute does not levy the tax against the occupation as a tax on the privilege of engaging in business as a distributor but upon the use of the product, and the user is made liable for its payment. See Section 5093-a1.

Without taking the space to analyze each of Appellant's cases, it will be sufficient to refer to only one to illustrate

the point we are attempting to make. The first case cited by Appellant on this point is *Central Transfer Co. vs. Commercial Oil Co.*, 45 Fed. (2d) 403. The statute there imposing the tax reads as follows:

> "Every dealer shall for the year 1925, and each year thereafter, when engaged in such business in this state, pay to the state treasurer an amount equal to two cents for each gallon of motor vehicle fuels sold or distributed by such dealer in this state during each year."

That was held to be an occupation tax, levied against dealers for the privilege of engaging in that business. It could hardly be held to be anything else unless its clear language were to be ignored. But that holding has no reference to a case where the tax is levied as it is in Section 5093-a1 of the Iowa statutes on the use of the product. The language of that statute is as follows:

> "A license fee * * * is hereby imposed on all motor vehicle fuel used or otherwise disposed of in this state for any purpose whatsoever. Any person using motor vehicle fuel within the state shall be liable for the fee herein provided for unless the same shall have been previously paid."

That levy is made on consumption. And none of these cases cited by Appellant aid its contention that it should be construed as something else. They are all cases where the levy was made against the privilege of carrying on the business of selling motor vehicle fuel.

The case at bar is ruled at this point by *Gregg Dyeing Co. vs. Query*, 286 U. S. 472, 76 L. ed. 1232, where, although

the dealer paid the tax to the state, the levy was on the use and this Court held it was a consumption tax, and that the burden rested on the consumer although not paid by him directly.

The fact that some one other than the one against whom the tax is levied may under some circumstances be required to pay it does not change the nature of the tax. The collection of taxes at the source has many advantages which are coming to be more widely recognized, and such a method of collection is free from constitutional objection. A typical example is the collection from a corporation of taxes levied against its stockholders.

> See *City National Bank vs. Kentucky*, 217 U. S. 443;
> *Clement National Bank vs. Vermont*, 231 U. S., 120
> *Pierce Oil Corporation vs. Hopkins*, 284 U. S. 137.

But it is said by Appellant that there is no provision in the statute for the distributor reimbursing himself by collecting the amount of the tax from the purchaser to whom he sells. It may not direct him to do it in just that language. But it does say to him that he must post a price placard where he sells his motor vehicle fuel advising the purchaser that the price he is paying includes the license fees. In other words, the seller must advise the purchaser when the sale is made that he is collecting the license fees. The difference between this and a direction to collect it is merely one of form rather than substance. And since this Court looks to the substance rather than the shadow (*International Paper Co. vs. Mass.* 246 U. S. 135) the distinction will hardly be held to be material, especially in view of the fact that the tax is

levied against the user, (Section 5093-a1) and the further fact that the user is given a refund of the amount of tax *paid by him* where the product is used for some purpose other than the operation of a motor vehicle upon the public highways.

What has heretofore been said disposes also of the contention of Appellant that the law is void and contravenes provisions of both the state and federal constitution in levying a tax for other than public purposes and for the benefit of a class of people, namely, those obtaining refunds. That contention rests entirely upon the proposition that the tax is an occupation tax levied against the dealer. It fails entirely when applied to a case where the tax is levied against the user. And since the policy of the law is to collect the tax only on the motor vehicle fuel used on the highways for the purpose of raising funds to improve the highways, there can be no objection to refunding to users the amount of the tax paid by them on motor vehicle fuel not used to propel motor vehicles on the highways.

VI.

THERE IS NO DISCRIMINATION UNDER THE IOWA STATUTE BETWEEN MOTOR VEHICLE FUEL IMPORTED INTO THE STATE AND MOTOR VEHICLE FUEL MANUFACTURED OR COMPOUNDED WITHIN THE STATE, AND IF THERE WAS COMPLAINANT IS IN NO POSITION TO RAISE THAT QUESTION.

a. TAX LEVIED AGAINST ALL MOTOR VEHICLE FUEL.

Appellant makes the further claim that the Iowa statutes discriminate between motor vehicle fuel which is imported and motor vehicle fuel which is produced within the state; and require distributors to pay the license fees only on imported motor vehicle fuel and make no provision for the payment of the license fees on motor vehicle fuel produced within the state. It is claimed that while imported motor vehicle fuel is taxed, motor vehicle fuel produced within the state is not taxed and a burden is thereby placed on interstate commerce. This contention cannot be sustained either by the language of the act or by the manner in which it is being enforced. It should at all times, of course, be kept in mind that no motor vehicle fuel is produced in the State of Iowa, no petroleum products are produced within the State and all motor vehicle fuel which is used in the state must come into the state in some form from outside, and the machinery which the law sets up for the enforcement of the tax was obviously set up with that fact in mind. However, the tax is specifically levied against all motor vehicle fuel used in the state without reference to its place of origin, and every person using motor vehicle fuel is made liable for the payment of the tax if it has not been previously paid.

For the convenience of the Court we set up the section which imposes the tax in full, as follows:

> "5093-a1. Amount of fee. A license fee of two cents per gallon or fraction of a gallon is hereby imposed on all motor vehicle fuel used or otherwise disposed of in this state for any purpose whatsoever. Any person using motor vehicle fuel within the state shall be liable

for the fee herein provided for unless the same shall have been previously paid. License fees shall be collected and disposed of in the manner hereinafter provided."

Section 5093-a2 defines a distributor as

"Any person who brings into the state or produces, refines, manufactures or compounds within the state any motor vehicle fuel used within the state or sold or otherwise disposed of by him within the state for use in the state."

Certainly there is no discrimination here. But it is urged by complainant that a distributor is required to pay the tax only upon motor vehicle fuel which he imports. It should be borne in mind, however, in connection with this claim that he is required to report not only motor vehicle fuel but also any "substance or material imported into the state for the purpose of manufacturing, mixing, blending or compounding motor vehicle fuels as defined in this chapter," so that the provisions with reference to the reporting and payment to the state by the distributor applies equally to motor vehicle fuel which is brought in from outside the state and motor vehicle fuel which is manufactured or compounded within the state from materials brought in from outside the state. It is submitted that this includes all the motor vehicle fuel in Iowa, but if by any chance there should be other

motor vehicle fuel produced in Iowa that is manufactured from domestic products and used in this state, it would still be liable for the payment of the tax. The most that could possibly be said would be that while distributors are required to pay this tax on all motor vehicle fuel used in Iowa which is brought in from outside the state, either in its finished state or as raw material, under the provisions of Section 5093-a5,

the user under the provisions of Section 5093-a1 would be required to pay the tax on any other possible motor vehicle fuel so that the tax would be levied and payable to the State of Iowa in both cases.

The case at bar is clearly ruled at this point and at several other points raised by Appellant by the decision of this Court in the case of *Gregg Dyeing Co. vs. Query*, 286 U. S. 472, 76 L. ed. 1232. In that case a state statute required a payment of six cents per gallon from each person

> "who shall import into this state from any other state or foreign country"

any gasoline or like product of petroleum which is intended to be stored or used for consumption in the state. The act was assailed on the ground that it imposed a burden on an importer for the privilege of importing gasoline into the state. What was said by the Court, speaking through Chief Justice Hughes, in that case is so decisive of many of the questions raised by Appellant in this case that we quote at length from the opinion:

> "As to interstate commerce, the questions are (1) whether the Act as applied by the state Court imposes a direct burden upon that commerce, and (2) whether, although the subject of the tax would otherwise be within the power of the State, the tax is invalid because it creates an unconstitutional discrimination against transactions in interstate commerce.
>
> "As to the first question, we are not concerned with what the tax is called, but with what the statute does. It imposes an exaction with respect to gasoline purchased in

other states and brought into South Carolina and there placed by appellants in storage for future use within the State. By the terms of the Act, as construed by the state Court and applied to these appellants, interstate commerce in relation to the subject of the tax has ended. The gasoline has come to rest within the State, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the State has the authority 'to tax the products of their storage or sale.' *Texas Co. vs. Brown*, 258 U. S. 466, 478, 66 L. ed. 721, 727, 42 S. Ct. 375; *Sonneborn Bros. vs. Curetón* (*Sonneborn Bros. vs. Keeling*) 262 U. S. 506, 519, 520, 67 L. ed. 1095, 1102, 43 S. Ct. 643; *Hart Refineries vs. Harmon*, 278 U. S. 499, 501, 502, 73 L. ed. 475-477, 49 S. Ct. 188. Not only may local sales of gasoline thus brought into the State be taxed, but its use as well. This was specifically determined in *Bowman vs. Continental Oil Co.* 256 U. S. 642, 648, 649, 65 L. ed. 1139, 1145, 41 S. Ct. 606. See *Hart Refineries vs. Harmon*, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188, supra; *George E. Breece Lumber Co. vs. Asplund*, 283 U. S. 788, 75 L. ed. 1415, 51 S. Ct. 352. There is an exception in the case of a tax directly on use in interstate commerce as on use in interstate transportation. *Helson vs. Kentucky*, 279 U. S. 245, 252, 73 L. ed. 683, 687, 49 S. Ct. 279; *Eastern Air Transport vs. South Carolina Tax Commission*, decided March 14, 1932 (285 U. S. 147, ante, 673, 52 S. Ct. 340). In view of these well established principles, we find no ground for concluding that the State could not impose the tax with respect to the gasoline of appellants which was kept within the State for use in their local enterprises. As the Court said, in *Hart Refineries vs. Harmon*, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188, supra, interstate transportation having ended, the taxing power of the State in respect of the commodity may, so far as the commerce clause of the Federal Constitution is concerned, 'be exerted in any way which the State's constitution and laws permit'. This, of course, is on the assumption that the tax does not discriminate against the commodity because of its origin in another State.

"The state Court answered the contention as to discrimination against interstate commerce by referring to other statutes of the State imposing a tax upon the sale and use of gasoline within the State. The state Court said that the Act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional 'within its four corners' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determed by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power. When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves. *Herbert vs. Louisiana*, 272 U. S. 312, 317, 71 L. ed. 270, 273, 48 A. L. R. 1102, 47 S. Ct. 103. See *Lindsley vs. Natural Carbonic Gas Co.* 220 U. S. 61, 73, 55 L. ed. 369, 375, 31 S. Ct. 337, Ann. Cas. 1912C, 160

"Reading together the statutes with respect to gasoline taxes, the state Court took the view that as the gasoline tax with respect to sales within the State, the burden actually rests upon the consumer, although not placed upon the consumer directly. No reason is found to challenge this view. *Texas Co. vs. Brown* (258 U. S. 479, 66 L. ed. 727, 42 S. Ct. 375) supra; *Panhandle Oil Co. vs. Knox*, 277 U. S. 218, 222, 72 L. ed. 857, 858, 56 A. L. R. 583, 48 S. Ct. 451; *Indian Mohorcycle Co. vs. United States*, 283 U. S. 578, 579, 75 L. ed. 1282, 1283, 51 S. Ct. 601. So far as dealers in gasoline within the State are concerned, there appears to be no ground for

appellants' claim of discrimination. The point with respect to appellants is that they are not dealers but users, consumers of gasoline in their business. They are required to pay the tax with respect to the gasoline they keep for such use and consumption within the State. As to such gasoline, they pay precisely the same amount per gallon as other consumers within the State are in effect required to pay through the tax on the dealers from whom such consumers buy. Discrimination is asserted in relation to manufacturers who produce gasoline within the State and consume it in their enterprises. Appellants have directed particular attention to the case of a refining company which produces gasoline in South Carolina and consumes gasoline in its business and also sells it within the State. The state Court, construing the applicable statute, has held that in such a case the producing company is taxed with respect to the gasoline it uses as well as with respect to the gasoline it sells. The decision is unequivocal that 'all oil companies in South Carolina are required to pay and do pay the tax upon any gasoline they sell and all that they use in South Carolina.' With respect, then, to the gasoline used by appellants in their business, there is in this aspect no discrimination against them because their gasoline has its origin in another state, as others either buying or producing gasoline within the state pay the tax at the same rate in relation to their consumption.

"Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries. *Shaffer vs. Carter*, 252 U. S. 37, 55, 64 L. ed. 445, 457, 40 S. Ct. 221. Appellants attack upon the tax comes to this, in the last analysis, that the tax in their case is laid with respect to the gasoline they have bought outside the State and keep in storage for use and consumption in their business, whereas others are taxed, not with respect to the gasoline they keep in store for use and consumption, but for the gasoline they use and consume. But appellants have admitted, as the state Court has said, that 'the only kind of storage affected' is that for the

purpose of use and consumption. In this view the state Court found no distinction of substance with respect to the practical operation of the taxing statutes in pari materia, as all in like case, appellants and others who use gasoline in their business enterprises, pay the same amount on the gasoline they consume. Appellants had the burden of showing an injurious discrimination against them because they bought their gasoline outside the State. This burden they have not sustained. They have failed to show that whatever distinction there existed in form, there was any substantial discrimination in fact.

"The same considerations, with respect to discrimination, apply to the claim that the statute in question violates the equal protection clause of the 14th Amendment. The statement of this Court in *General American Tank Car Corp. vs. Day*, 270 U. S. 367, 373, 70 L. ed. 635, 638, 46 S. Ct. 234, is apposite: 'In determining whether there is a denial of equal protection of the laws by such taxation we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary."

It will be noted that the act assailed in the case from which the above quotation is made was one which required payments to be made only by persons who imported, but that other statutes required payment by users of gasoline produced within the state and that because of that fact there was no burden created on the products imported into the state. The same situation exists in the case at bar as heretofore pointed out, although as a matter of fact there is no motor vehicle fuel produced in Iowa as there was in South Carolina.

It will be noted further that the Court holds the tax to be in reality a consumers tax and that the burden rests on the consumer although not paid by the consumer directly. And by the same token the Iowa motor vehicle fuel tax is in reality a consumers tax although initially paid by the distributor.

b. APPELLANT CANNOT RAISE THE QUESTION OF DISCRIMINATION.

Appellant was unable to show at the trial any such discrimination as it attempts to complain of on this appeal. The most that it attempted was to show that some motor vehicle fuels were being produced in Iowa by means of blending or compounding but it was revealed that the State of Iowa had a suit against such persons for the collection of the license fee and under the provisions of Section 5093-a5 persons bringing into the state materials to be used in manufacturing or compounding motor vehicle fuels are under the same duty to report and pay the tax on said products as they are on motor vehicle fuel itself, so that certainly there can be no discrimination in that respect.

That there are no motor vehicle fuels produced in Iowa in the sense that there are no oil wells in the state and no petroleum products originating in the state, was established without any controversy at the trial, and among the findings of the Court is the following:

"No gasoline has ever been produced or refined in Iowa

except that refined by the Mona Motor Oil Company at Carter Lake, Iowa, prior to April first, 1932."

Transcript, p. 87.

It thus appears that the only refining ever done in Iowa was done by the Appellant in this case so that if there were any possible discrimination under the provisions of the Iowa statute in favor of motor vehicle fuel produced within the state as against motor vehicle fuel imported from outside the state, that discrimination is in favor of Appellant.

It is well settled that a person in order to be in a position to complain of discrimination must belong to the class discriminated against. See *Cronin vs. Adams*, 192 U. S. 108; *McKinney vs. State*, 30 Pac. 293; *Chadwick vs. Kelly*, 187 U. S. 540.

The motor vehicle fuel license fees which Appellant is seeking to have the State of Iowa restrained from collecting are on motor vehicle fuel refined in Iowa, and Appellant is the only one who ever refined motor vehicle fuel in Iowa. It cannot complain that the law discriminates against it by not taxing motor vehicle fuel refined in Iowa because if such discrimination existed it would be the beneficiary and the sole beneficiary.

VII.

THE APPELLANT IS ESTOPPED FROM QUESTIONING THE CONSTITUTIONALITY OF THE IOWA STATUTES IMPOSING MOTOR VEHICLE FUEL LICENSE FEES.

Appellant is estopped to raise the question of the constitutionality of the motor vehicle fuel tax laws of the State of Iowa. The record in this case shows without any controversy that the Appellant applied for a permit to engage in business as a distributor under the motor vehicle fuel tax laws of the State of Iowa and put up the necessary security and paid the tax monthly for a period of years without in any way questioning the validity of the tax. The record further shows that during that period the state or some of its municipal subdivisions issued some one hundred million dollars worth of bonds in anticipation of their payment by the revenues to be derived from this tax, and it is conceded that the Appellant knew that these obligations were being contracted in anticipation of their payment in that manner and during all that time raised no question about the validity of the act, and that this continued until it was discovered that Appellant was shipping gasoline as lubricating oil and thus seeking to avoid the payment of the tax. It is suggested that this course of conduct on the part of Appellant is sufficient to estop the Appellant from now questioning the validity of the law.

There is even a stronger reason why Appellant is estopped in this case from seeking the injunction for which it prays in this case. It was established in the trial and found as one of the facts by the Court that the forty carloads of gasoline which were shipped as lubricating oil and dumped into the gasoline storage tanks of the Appellant at Council Bluffs, Iowa, were sold in Iowa at service stations where the Appellant kept on display a placard advising the purchasers of motor vehicle fuel that the purchase price they were paying included the motor vehicle fuel license fee. And it was like-

wise stipulated and found as a fact by the Court that the price paid by the purchasers for that motor vehicle fuel was the same as that paid by other purchasers on fuel which included the tax. In other words, the Appellant collected from the purchasers of that gasoline a three cent license fee on each gallon at the time it was sold and the Appelllant still holds that money obtained by it in pursuance of the very statute that it is now seeking to have declared unconstitutional. In other words, the Appellant used the machinery of this Iowa statute, and the placard which the statute prescribes shall be maintained at its service stations, as a means of obtaining three cents per gallon in addition to the purchase price from each purchaser of motor vehicle fuel, and it is in no position to now claim that the statute under which it procured the money is unconstitutional and thus be permitted to retain it, and the granting of the injunction for which Appellant prays in this case would have that effect. That one can estop himself from questioning the constitutionality of a law is well settled.

See Note 19, Ann. Cas. 175

It would be hard to imagine circumstances more completely estopping one from questioning the constitutionality of the law than those which exist in this case as against the Appellant who is seeking to retain funds which it was enabled to collect by virtue of the provisions of the identical law that it is now seeking to have declared unconstitutional.

CONCLUSION

By way of conclusion and summary, it is the contention of Appellees that this suit is not maintainable in equity under the circumstances in this case, and that Appellant is in no position to raise the objections which it has attempted to raise against the constitutionality of the statutes of Iowa imposing motor vehicle fuel taxes. Moreover, if the question of the constitutionality of the Iowa statutes in the respects complained of by Appellant were properly before the Court, no other conclusion would be possible than that said statutes do not violate the Constitution of the United States.

The power of a state to tax is absolute except as limited by the provisions of the Constitution of the United States. A state may not, under the guise of taxation, attempt to regulate interstate commerce or impose any burden upon that commerce.

It is claimed that the motor vehicle fuel tax laws of the State of Iowa burden interstate commerce. A critical examination of those laws demonstrate that they do not impose any tax upon motor vehicle fuel until after it comes to rest in the state; that they impose no burden upon motor vehicle fuel sold for shipment outside the state, and that they impose no burden upon or interference with a person engaged in the business of carrying on interstate commerce in motor vehicle fuels. And further, that the laws of the State of Iowa operate equally upon motor vehicle fuel brought into the state from outside the state and motor vehicle fuel produced within the state. Under these circumstances, it can hardly be

claimed that any burden is imposed upon interstate commerce, especially, when it is kept in mind that the effect of the operation of state taxing laws on interstate commerce must be something more than incidental and must be substantial before the Court will interfere with their enforcement, and when it is further kept in mind that this Court said in *Gregg Dyeing Company vs. Query*, 286 U. S., 472, that

> "We must deal in this matter, as in others, with substantial distinctions and real injuries."

and further that Appellants

> "have failed to show that whatever distinction there exists in form there was any substantial discrimination in fact."

The motor vehicle fuel tax laws of the State of Iowa, by their plain provisions and method of enforcement, impose a tax upon the use of motor vehicle fuel to operate motor vehicles upon the highways of the state for the purpose of raising revenues for the improvement of said highways. And while the tax is levied upon all of the fuels, refunds are permitted to those who use the fuel for some purpose other than the operation of motor vehicles on the highways. The law imposes a tax on a purely domestic business and no effort is made under the terms of the law or in the method of its administration to interfere with commerce between the states or to in any way burden such commerce, and the statutes imposing the tax, therefore, are not unconstitutional

as in conflict with the commerce clause of the Federal Constitution.

Respectfully submitted,

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APPENDIX
CHAPTER 251-A1
MOTOR VEHICLE FUEL TAX

5093-a1. Amount of fee.
5093-a2. Definition of terms.
5093-a3. Sale price placard—misdemeanor—penalty.
5093-a4. Certificate—license.
5093-c2. Distributor—requirements.
5093-a5. Reports—remittances—rebate—penalties.
5093-b1. Tank car reports—inspection of books.
5093-a6. Books open to inspection.
5093-a7. Misdemeanor—penalty.
5093-a8. Reimbursement—procedure—false statement.
5093-a9. Distribution of proceeds.
5093-a10. Refunds quarterly.
5093-a11. Employees—appropriation.
5093-a12. Act separable.

5093-a1. Amount of fee. A license fee of two cents per gallon or fraction of a gallon is hereby imposed on all motor vehicle fuel used or otherwise disposed of in this state for any purpose whatsoever. Any person using motor vehicle fuel within the state shall be liable for the fee herein provided for unless the same shall have been previously paid. License fees shall be collected and disposed of in the manner hereinafter provided.

Additional fee of one cent, Section 4755-b38.

5093-a2. Definition of terms. The term "distributor" as used in this chapter shall mean any person who brings into the state or who produces, refines, manufactures or compounds within the state any motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state. Provided, how-

ever, a person coming into the state traveling by motor vehicle may transport, for his own use, in the ordinary motor vehicle fuel tank attached to and forming a part of such motor vehicle, not more than twenty gallons of motor vehicle fuel without being considered a distributor.
The term "person" includes individual, partnership, corporation and association.
The term "treasurer" means the treasurer of the State of Iowa.

"Motor vehicle fuel" shall mean and include any substance or combination of substances which is intended to be or is capable of being used for the purpose of propelling or running by combustion any internal combustion engine and kept for sale or sold for that purpose, except the products commonly known as kerosene and/or distillate or petroleum products of lower gravity (Baume scale) when not used to propel a motor vehicle or for compounding or combining with any motor vehicle fuel.

5093-a3. Sale price placard — misdemeanor — penalty. Any person who sells or offers for sale at retail motor vehicle fuel in this state, shall keep posted in a conspicuous place, most accessible to the public, at his place of business, a placard showing the total sale price per gallon including license fee, of all grades of motor vehicle fuel sold, said placard to have printed thereon the words "state license fee included."

When quantity discounts or rebates are allowed, such facts shall be shown on the placard in the manner designated by the treasurer of state in regulations promulgated by him. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not to exceed one hundred dollars or imprisonment in the county jail for a period of not to exceed thirty days.

5093-a4. Certificate—license. Each distributor now engaged in business as herein defined, shall within thirty

days after this chapter becomes effective, and every distributor desiring to engage in such business shall, before beginning the sale or manufacture of motor vehicle fuel in this state, file a duly acknowledged certificate with the treasurer of state ~~on forms~~ prescribed and furnished by him, which shall contain the name under which such distributor is transacting business within the state of Iowa, and the principal place of business of such distributor. If such distributor is a firm or copartnership, the certificate shall also contain the names and addresses of the several persons constituting same, and if a corporation or municipal subdivision, the corporate name under which it is authorized to transact business, the names and addresses of its principal officers, resident general or managing agent and attorney in fact.

Each distributor now engaged in business as herein defined, shall, within sixty days after this chapter becomes effective, and any person or persons desiring to engage in such business shall, before beginning the manufacture or sale of motor vehicle fuel within the state, procure a license from the treasurer of state permitting said distributor to transact said business within the state of Iowa, The treasurer of state, upon application of any person or persons who has filed the required certificate, shall issue such person or persons a license as licensed distributor permitting such person or persons to continue or engage in business as a licensed distributor in the state of Iowa. It shall be unlawful for any distributor to continue or to engage in or to transact the business of a distributor without first having procured a license as required in this section.

5093-2c. Distributor—requirements. Before any distributor shall engage in business as defined in this chapter, he shall first file with the treasurer of state a statement showing financial responsibility satisfactory to said department, or a corporate surety bond payable to the state of Iowa in the penal sum of one thousand dollars, conditioned that said distributor will pay to the state of

Iowa any and all fees required by the law. Said bond, or financial statement, shall be approved by the treasurer of state. No license shall be issued unless the bond, or financial statement, required herein is attached to and delivered to the treasurer of state with the application for said license. If any distributor now engaged in business fails to file the bond, or financial statement, required by this section within thirty days after the effective date thereof, his license shall be revoked.

5093-a5. Reports—remittances—rebates—penalties. On or before the twentieth day of each calendar month each distributor of motor vehicle fuel shall file in the office of the treasurer of state, at Des Moines, Iowa, a duly acknowledged report on forms prescribed and furnished by said treasurer, showing the total number of gallons of motor vehicle fuel and/or of any substance or material imported into the state for the purpose of manufacturing, mixing, blending or compounding motor vehicle fuels as defined in this chapter imported by him during the preceding calendar month, the date of receipt, unloading point, tank car identification and invoiced gallonage of each and every tank car or other receptacle in which motor vehicle fuel is imported into the state of Iowa. If no importations are made for the preceding calendar month, a report shall be made to that effect on the forms prescribed herein, and in the same manner. At the same time he shall remit to the treasurer the amount of the license fee for such preceding month; provided, however, that in computing said amount a deduction of three per cent of the invoiced gallonage imported may be made for evaporation and loss.

If, after the prescribed license fees are so remitted and paid, any motor vehicle fuel in the possession of a licensed distributor is destroyed by fire, lightning, storm or accident not caused by the fault of such distributor or any employee thereof, before being sold or used by him, upon proper application therefor and proof of such destruction or loss satisfactory to the treasurer of state, the

said treasurer is authorized to certify to the amount of the license fees so paid thereon to the auditor of state as a refund. The auditor of state shall issue his warrant drawn on the motor vehicle fuel fund in payment thereof and the same shall be paid in the same manner and from the same fund as those refunds authorized in Section 5093-a8.

If any distributor of motor vehicle fuel shall fail to remit on or before the twentieth of each month to the treasurer of state to cover the license fees due on that date, a penalty of ten per cent of the amount thereof shall immediately accrue and become due and payable when such license fees are paid or collected. If any such distributor shall fail to pay such license fees and penalities within ten days after date due, the attorney general shall bring appropriate action for the recovery of such license fees and penalty; and in addition whenever any licensed distributor fails to render the prescribed reports, renders a false report to the treasurer, or fails to pay the license fee due within the prescribed time, the treasurer of state may revoke the license of such distributor, and any such licnse so revoked shall not be renewed unless the treasurer of state is satisfied that the applicant therefor will in the future comply with the requirements of this chapter. Neither this act (42GA, ch 248) nor any of its provisions shall apply to foreign or interstate commerce.

5093-b1. Tank car reports—inspection of books. Every railroad company, or other person, firm or corporation transporting motor vehicle fuel in tank cars or other receptacles from without the state consigned and delivered to any point within the state shall, through its local agent or agents, on or before the tenth of each calendar month, forward to the treasurer of state a report of forms furnished by said treasurer, for each station or place of destination, showing the name of the railroad or other carrier, the date of unloading and identification of each tank car or other conveyor of motor vehicle fuel received at the station or place during the preceding calendar month, the name of the consignor, the name of

the consignee, the number of gallons of motor vehicle fuel and/or of any substance or material imported into the state for the purpose of manufacturing, mixing blending or compounding motor vehicle fuels as defined in this chapter. The books, records and reports of each railroad or other carrier pertaining to the transportation and delivery of motor vehicle fuel as herein defined shall be subject to inspection during ordinary business hours by the treasurer or his representatives.

5093-a6. Books open to inspection. The books, records, papers, receipts, invoices and equipment of any distributor which pertain to the sale of motor vehicle fuel shall be subject to inspection at any time during ordinary business hours by the treasurer or his representatives, but any information gained by the treasurer of state or such representative by such investigation, shall be confidential and any person divulging such information shall be deemed guilty of a misdemeanor and upon conviction thereof shall be liable to a fine not exceeding one thousand dollars.

5093-a7. Misdemeanor—penalty. Any distributor, railroad or transportation company or agent of a railroad or transportation company who shall fail to make, or refuse to make the reports or certificates to the treasurer as herein prescribed, or shall refuse to permit the treasurer to examine the books, records, papers, receipts, invoices, or equipment of such distributor pertaining to the sale of motor vehicle fuel or who shall make any incomplete false or fraudulent return hereunder, or shall in any manner violate the provisions of Sections 5093-a4, 5093-a5, and 5093-b1 hereof shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars. If a distributor is a corporation and fails to comply with the provisions of this chapter, each principal officer thereof shall be deemed guilty of a misdemeanor and shall each be subject to punishment therefor.

5093-a8. Reimbursement—procedure—false statement. Any person who shall buy or use any motor vehicle fuel for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats, airplanes or aircraft, motor vehicles, trucks and tractors owned and operated by the state of Iowa, or by a municipality for municipal purposes within the state, or who shall purchase or use any motor vehicle fuel for cleaning or dyeing, or for any other commercial use except for propelling motor vehicles operated in whole or in part upon the public highways of the state or upon the streets of any city or town in the state, shall be reimbursed and repaid the amount of such license fee paid by him, upon presenting to the treasurer of state a statement accompanied by the original invoices showing such purchase which statement shall set forth the total amount of motor vehicle fuel so purchased, paid for and used by such consumer other than for propelling motor vehicles operated or intended to be operated in whole or in part upon any of the public highways of this state or upon the streets of any city or town of this state and the treasurer of state shall, upon the presentation of such invoice, cause to be repaid from the funds collected hereunder, the amount of such license fee paid by such consumer on motor vehicle fuel used for purposes other than propelling motor vehicles as hereinbefore provided. All applications for refunds or reimbursements as provided for in this chapter shall be filed with the treasurer of state on blank forms provided by him for that purpose within ninety days after the date on which such motor vehicle fuel shall have been purchased as shown by the invoice. Any person, firm, or corporation who shall make any false statement in connection with an application for refund of any money or license fee as herein provided or who shall collect or cause to be repaid to him or any person, any such fees, without being entitled to the same under the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not to exceed one thousand dollars.

5093-a9. Distribution of proceeds. License fees collected under the provisions of this chapter shall be distributed and disbursed as follows: One-third to the primary road fund. Two-thirds to the secondary road construction fund of the several counties of the state. The treasurer shall apportion said two-thirds portion among the counties of the state in the ratio that the area of each county bears to the total area of the state, and shall, on the first day of each month, remit to the treasurer of each county the amount apportioned to the secondary road construction fund of the county.

5093-a10. Refunds quarterly. The refunds provided for in Section 5093-a8 shall be made quarterly, by the treasurer of state. Claims for refunds shall be made on blanks provided by the treasurer of state and under such proofs under oath as he may prescribe. The auditor of state shall issue his warrants for refunds certified to him by the treasurer of state.

5093-a11. Employees—appropriation. The treasurer of state is authorized to employ such clerical and other help as may be needed to carry out the provisions of this chapter, the number and compensation of such employees to be fixed by the executive council.

There is hereby appropriated out of the money received under the provisions of this chapter sufficient funds to pay for help employed by the treasurer in enforcing the chapter and for making such refunds as are provided for herein, and to pay the cost of postage, equipment, supplies and printing, used by the department.

5093-a12. Act separable. If any part of this chapter is held to be unconstitutional or invalid by the Courts, such decision shall not affect the validity of the remaining portions of this chapter.